Supreme Court, U.S.
FILED
OCT 24 1988
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No. 88-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

AMERICAN STANDARDS TESTING BUREAU, INC.,

Petitioner

vs.

HONEYWELL, INC.,

Respondent

vs.

AETNA LIFE & CASUALTY COMPANY,

Respondent

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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STATEMENT OF QUESTION PRESENTED FOR REVIEW

Whether Aetna Life & Casualty Company ("Aetna") was obligated, as matter of law, to indemnify American Standards Testing Bureau, Inc. ("ASTB") for damages arising out of a judgment against Honeywell, Inc., an Aetna insured, in an action for which ASTB was retained to provide expert witness services, where (a) the ASTB "Service Agreement" pursuant to which ASTB rendered services at the request of Aetna staff counsel representing Honeywell included ASTB's standard indemnification clause; and (b) Aetna staff counsel accepted and caused Aetna to pay for services rendered by ASTB without objecting to the indemnification provision.

RULE 28.1 LIST

Petitioner American Standards Testing Bureau, Inc. has no parent companies, subsidiaries, or affiliates to list pursuant to Rule 28.1.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

To the Honorable, the Chief Justice and the
Associate Justices of the Supreme
Court of the United States:

Petitioner, American Standards Testing Bureau, Inc., hereby respectfully petitions this Court that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit, which was entered in this case on June 29, 1988.

REFERENCE TO OFFICIAL AND UNOFFICIAL REPORTS OF THE OPINIONS DELIVERED IN THE COURTS BELOW

The opinion of the Court of Appeals for the Third Circuit has not yet been reported but is set out in the Appendix at 1a.

The opinions of the United States District Court for the Eastern District of Pennsylvania have not been reported, but are set out in the Appendix at 19a and 26a.

STATEMENT OF JURISDICTION

The jurisdiction of the district court was invoked under 28 U.S.C. §1332 in that there was complete diversity of citizenship and the amount in controversy exceeded $10,000, exclusive of costs and interest.

The Court of Appeals entered its opinion and judgment on June 29, 1988. It denied a Petition for Rehearing on July 25, 1988. Petitioners invoke the jurisdiction of this Court pursuant to 28 U.S.C. §1254(1).

STATUTORY PROVISION INVOLVED

No federal statutory provision is directly involved in this matter. The failure of the Court of Appeals and the district court to enforce Aetna's indemnification obligations, however, constitutes an impairment of ASTB's contractual rights protected by the Fifth Amendment to the United States Constitution, which, in pertinent part, provides:

> "No person shall ... be deprivied of life, liberty or property, without due process of law. ..."

STATEMENT OF THE CASE

It is a pervasive practice in the field of commercial transactions for one party to offer to render services subject to certain terms and conditions, with the other party directing the first to proceed, without either expressly assenting or objecting to those terms and conditions. The party performing the services has the right to rely upon the other party's acceptance of those services as a manifestation of assent to the general terms and conditions pursuant to which the services are rendered.

In the instant matter, staff counsel for Aetna Life & Casualty Company ("Aetna") requested American Standards Testing Bureau, Inc. ("ASTB") to provide expert witness services to assist the staff counsel in his defense of a personal injury action against Honeywell, Inc., Aetna's insured. ASTB responded to this request by a letter addressed to Aetna which stated that ASTB would extend its services *to Aetna* on the basis of, *inter alia,* two express written conditions. ASTB's "Service Agreement," dated February 26, 1982, outlined the conditions upon which it would provide expert witness services. It provided that the agreement was between ASTB and the "addressee named on the face [sheet] ... *as principal.*" [Emphasis in original.] Significantly, Aetna is identified as the addressee on the face sheet. A second condition set forth in the "Service Agreement" was that Aetna would indemnify ASTB for all liability, "even if it be caused by the negligence or gross negligence of ASTB ...." (App. 46a.)

Neither Aetna's staff attorney nor Aetna itself ever objected to any of the terms and conditions outlined in the ASTB "Service Agreement." On the contrary, after receiving the ASTB Service Agreement, Aetna's staff counsel sent a letter dated March 8, 1982 acknowledging that Aetna was retaining ASTB's services. (App. 49a.) After receiving the written directive to proceed, ASTB prepared a report and forwarded it to Aetna staff counsel. (App. 60a.) Aetna subsequently paid ASTB's invoices for the work performed.

The litigation for which ASTB's services had been retained involved a claim of a Bell Telephone Company employee, John Ball, who was injured at a Honeywell facility when he fell from a ladder into a glass partition panel, injuring his left hand. It was alleged in that action that Honeywell had been negligent in using plate glass panels for office partitions.

Aetna was obligated to defend and indemnify Honeywell under a general liability insurance policy. Aetna staff attorney Joseph C. DeMaria was assigned Honeywell's defense. (App. 48a). In March, 1981, Ball's counsel informed the court that he intended to call an expert witness regarding the safety of using plate glass partition panels. (App. 59a.) Almost one year later, and after *Ball* appeared on the trial list several times, DeMaria telephoned ASTB, requesting that it provide expert witness services. (App. 58a.). It was in response to this telephone call that ASTB submitted its standard "Service Agreement," containing the terms and conditions, including the indemnification provision, pursuant to which it offered to provide services to Aetna.

The report prepared by ASTB after receipt of Aetna's letter of March 8, 1982 acknowledging Aetna's retention of ASTB contained the vicarious signature of Dr. C. F. Peck. Aetna staff counsel, however, did not interview Dr. Peck until the third day of trial, in January, 1983. (App. 52a.) The purpose of the interview was to prepare Dr. Peck for his deposition, which was to be taken by plaintiff's counsel before Dr. Peck could testify at trial. During this deposition it was determined that Dr. Peck had not visited Honeywell before the written report bearing his signature had been prepared. (App. 53a, 54a.) Based on this disclosure, Aetna staff counsel opted not to call Dr. Peck as an expert at trial. (App. 57a.) The jury subsequently returned a verdict in favor of plaintiff. Honeywell subsequently settled the matter for $300,000.

Honeywell then initiated this action against ASTB, alleging that its loss was due solely to ASTB's conduct in failing to provide adequate expert witness services. ASTB, in turn, served a Third-Party Complaint for indemnity against Aetna.

ASTB moved for summary judgment against Aetna on the basis of the indemnification clause. The district court denied this motion, concluding that Aetna's indemnification obligation presented an issue of fact. (App. 26a.) The district court also denied ASTB's motion for a direct verdict. Instead, the trial court instructed the jury that the issue before it was whether the ASTB service agreement "was the contract of the engagement between Aetna and ASTB." (App. 61a.)

The jury returned a verdict in favor of Honeywell in the amount of $319,900. The jury also answered a special interrogatory that ASTB had not shown by a preponderance of the evidence that Aetna "contracted to hold ASTB harmless for negligence in rendering its services in *Ball v. Honeywell.*" (App. 62a.) ASTB's Motion for Judgment Notwithstanding the Verdict, or, in the alternative, for a New Trial, was denied by the district court, which concluded that it had properly submitted to the jury the question of whether ASTB had proved that Aetna had agreed to hold ASTB harmless. (App. 40a.)

The Third Circuit, in addressing this issue,[1] concluded that the request of Aetna staff counsel that ASTB provide expert witness services constituted an offer, and that ASTB's submission of its standard "Service Agreement" constituted a counteroffer. Despite the fact that Aetna's staff counsel acknowledged the retention of ASTB after receiving ASTB's "Service Agreement," and notwithstanding the fact that both Aetna and its staff counsel accepted and paid for the services rendered by ASTB without objecting to any of the provisions of the ASTB "Service Agreement," the Third Circuit concluded that there was "no evidence ... that American Standards condition of indemnification was accepted by [Aetna's staff counsel] or by Aetna." (App. 17a.) Thus, the Third Circuit sustained "the jury's finding that no contract containing an indemnification term existed between Aetna and American Standards." (App. 17a.)

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[1] The Court of Appeals for the Third Circuit addressed the issue of whether Aetna was obligated to indemnify ASTB under Pennsylvania law. It should be noted that the ASTB "Service Agreement" provides that New York law governed the party's contractual rights and obligations. (App. 46a.)

REASONS FOR ALLOWANCE OF THE WRIT

A. THE DISTRICT COURT AND THIRD CIRCUIT PANEL COMMITTED AN OBVIOUS AND EXCEPTIONAL ERROR IN HOLDING THAT THE INDEMNIFICATION PROVISION WAS NOT PART OF THE CONTRACT BETWEEN AETNA AND ASTB.

This appeal involves a question of fundamental importance in commercial transactions: whether a standard agreement, common in the service industry, which does not require signatures, and which is submitted to a prospective client as the basis on which services are to be rendered, constitutes the terms and conditions of the parties' contractual relationship when that prospective client retains and accepts the performing party's services without objecting to any provision of the standard agreement. Application of rudimentary principles of contract law, common throughout the United States, compels the conclusion that those terms do indeed govern the party's contractual relationship. The party rendering those services has the right to rely upon the enforceability of the terms and conditions pursuant to which its services have been offered.

The Third Circuit ruling in this matter defeated ASTB's reliance upon its standard "Service Agreement" and portends an insidious *sub silentio* change in the law governing commercial transactions. In essence, the Third Circuit improperly places in the realm of fact-finding the question of whether standard terms and conditions, to which no objection is made by the party accepting the rendition of services, are enforceable by the party rendering those services. Clearly, the result in this case cannot be justified.

Certainly, it cannot be disputed that Aetna itself was a party to the contract pursuant to which ASTB performed its services. Aetna's staff attorney was clearly an agent for Aetna. He was assigned by Aetna to defend Honeywell in the *Ball v. Honeywell* action. In this capacity, he was plainly clothed with the authority to retain expert witnesses to assist the defense of the case. Thus, when staff counsel retained ASTB, he was unquestionably acting in his capacity as agent for Aetna.

Aetna officials acknowledged, in correspondence, that Aetna, not Honeywell, contracted for ASTB's services. For example, an April 12, 1982 file memorandum expressly noted that "[i]n an effort to counter the expert outlined in *our* last report *we* [*Aetna*] had enlisted the services of [ASTB] . . . ." (App. 63a; emphasis supplied.)[2]

Furthermore, that ASTB contemplated a contract with Aetna, not Honeywell, is evidenced by the "Service Agreement" forwarded to Aetna's staff attorney on February 26, 1982. The first paragraph of the "Service Agreement" provides that "[t]his agreement is between [ASTB] . . . and the addressee named on the face hereof or in the document attached hereto, *as principal*, . . ." (emphasis in original.) Significantly, "Aetna Life and Casualty" is the named addressee on the face sheet to the "Service Agreement" and, accordingly, was the only party with whom ASTB contracted.

That the contract for expert witness services was between Aetna and ASTB also follows from the "professional practice" observed by counsel in retaining its expert witnesses. It is common for *counsel* to retain expert witness services, as opposed to the client, so as to preserve the work product privilege. Since the attorney who retained ASTB was an Aetna employee,

[2] This and other documents constituting clear admissions concerning the capacity in which Aetna staff counsel engaged ASTB's services were inexplicably denied admission by the trial court. These documents, however, were submitted in support of ASTB's Summary Judgment Motion, and warranted entry of judgment in favor of ASTB.

and since that employee was acting within the scope of his authority, Aetna was bound by the terms and conditions of staff counsel's agreement with ASTB.

Aetna claims that it did not contract with ASTB because its staff attorney never represented to ASTB that he was acting as an agent for Aetna. This fact is simply irrelevant in determining that DeMaria was an employee and agent of Aetna. The crucial facts establishing Aetna's liability as principal are that Aetna is the named principal on the "Service Agreement," its staff attorney had clear authority to act on behalf of and bind Aetna, and he never stated, even after receiving ASTB's "Service Agreement," that he was not representing Aetna.

The Court of Appeals correctly recognized that, as a matter of law, ASTB's February 26, 1982 correspondence was a counteroffer to the staff attorney's offer. *See, e.g., Alexanian v. Fidelity-Philadelphia Trust Co.*, 152 Pa. Super. 23, 30 A.2d 651 (1943) (in determining whether defendant's letter reply constituted a counteroffer court holds that "there was nothing to submit to a jury; the question was one of law for the court").[3] This ruling is consistent with the generally recognized rule that "[the] question [of] whether an undisputed set of facts establishes a contract is one of law." *Buff v. Fetterolf*, 207 Pa.Super. 92, 215 A.2d 327, 330 (1965); *In re Home Protection Bldg. & Loan Ass'n*, 143 Pa.Super. 96, 17 A.2d 755, 757 (1941).

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[3] The Third Circuit panel cited *DeMoss v. Beryllium Corp.*, 358 Pa. 470, 58 A.2d 70, 72 (1948), for the proposition that it is a question for the jury to determine whether a reply which suggests changes or additions to an offer is either an acceptance or counteroffer. It is respectfully submitted that the panel misconstrued *DeMoss* in that it makes no reference to this being a question of fact for the jury. Even if *DeMoss* did, in fact, support this proposition, it is readily distinguishable in that it found the reply document's language so ambiguous as to require additional testimony to ascertain defendant's intent. In this regard, the court noted that it could not ascertain whether defendant's reply was "a counter-proposal or whether it was merely a gratuitous undertaking on defendant's part. . . ." *Id.* at 71-72. In contrast, ASTB's Service Agreement is clear and unambiguous.

ASTB's February 26th correspondence clearly was a counteroffer to Aetna's offer because it expressly stated that "[its] services are extended to [Aetna] *on the basis of the conditions printed overleaf.*" (emphasis added). In this respect, one of the primary "terms" referenced in ASTB's February 26th correspondence is, of course, the indemnification provision. ASTB's response thereby materially altered the staff attorney's offer and was a counteroffer. *See Thomas A. Armbruster, Inc. v. Barron,* 341 Pa. Super. 409, 491 A.2d 882, 887 (1985) ("an alleged acceptance is not unconditional, and is thus not an acceptance, if it alters 'the terms of the offer in any material respect . . . .' ").[4]

A counteroffer is accepted in the same manner as an offer. *Houston Dairy, Inc. v. John Hancock Mut. Life. Ins. Co.,* 643 F.2d 1185, 1186 (5th Cir. 1981). "It is fundamental . . . that acceptance of an offer may be manifested either expressly (as by words) *or impliedly by conduct indicating assent* to the proposed bargain." *Thomson v. U.S.,* 357 F.2d 683, 689 (Ct.Cl. 1966) (citing *Restatement (Second) of Contracts* §§5, 21, 21A, 52, Comment c (1964)); *Gum, Inc. v. Felton,* 341 Pa. 96, 17 A.2d 386, 389 (1941); *Havens Steel Co. v. Randolph Eng'r Co.,* 613 F.Supp. 514, 522 (W.D.Mo. 1985), *aff'd,* 813 F.2d 186 (8th Cir. 1987) (citations omitted). "The notion that assent to the terms of an agreement (i.e., acceptance) may be expressed by action or conduct underlies the rule, *repeatedly recognized by the courts,* that contracts may be "implied in fact.' " *Thomson,* 357 F.2d at 689 (emphasis added).

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[4] Thus, the panel's decision is entirely consistent with the common law "mirror image" rule regarding offer and acceptance. That is, "[t]o constitute a contract, the acceptance of the offer must be absolute *and identical* with the terms of the offer." *Hedden v. Lupinsky,* 405 Pa. 609, 176 A.2d 406, 408 (1962) (emphasis added); *Cohn v. Penn Beverage Co.,* 313 Pa. 349, 352, 169 A. 768 (1934). It follows from this rule that a reply to an offer which purports to accept it, but which states terms different from or adds qualifications to the offer, is a counteroffer, not an acceptance. *Hedden,* 176 A.2d at 408; *Hahnemann Medical College & Hosp. v. Hubbard,* 267 Pa.Super. 436, 406 A.2d 1120, 1122 (1979); *Daly v. Bright,* 413 F.Supp. 28, 30 (E.D.Pa. 1975); *Restatement (Second) of Contracts* §60 (1981).

The court in *American Standards Testing Bureau, Inc. v. Francis J. Lynch, P.C.,* Civ No. 68403/85 (N.Y.Civ. 1985) (a copy of which is attached hereto at App. 65a.), applied these principles to facts identical to those in the case *sub judice.* In *Lynch,* defendant, a Massachusetts attorney, telephoned ASTB to contract for expert witness services. *Id.* Thereafter, by letter dated August 1, 1983, ASTB informed defendant that it would provide expert witness services under the specific conditions referenced in the "Service Agreement" transmitted with the correspondence. *Id.* One condition contained in the agreement was that it be governed by New York law. *Id.* Defendant never objected to these terms and proceeded to use ASTB's expert services.

When litigation arising out of this agreement ensued, however, defendant claimed that it never agreed to and was not bound by the terms. The court disagreed, reasoning that "defendant never informed plaintiff that he would not accept these conditions, and did in fact use the plaintiff's services. Under such circumstances, defendant's silence constitutes an acceptance of the terms." *Id.* (citing *Josephine & Anthony Corp. v. Horwitz,* 58 A.D.2d 643, 396 N.Y.S.2d 53 (1977)).

Similarly, in *Textron, Inc. v. Teleoperator Sys. Corp.,* 554 F.Supp. 315 (E.D.N.Y. 1983), plaintiff sent a letter informing defendant of plaintiff's "intent to proceed with the program as outlined. . . ." *Id.* at 324. The court found significant the fact that defendant reviewed the letter, but never objected to its contents. *Id.* Specifically, the court noted that "[t]he situation at hand is made even more compelling as more than silence exists — defendant having acknowledged receipt of the letter of intent in his reply of February 16 without objection." *Id.* The court, therefore, found that this letter "coupled with defendant's performance without objection constituted a legally binding contract." *Id.* (citations omitted).

This Petition for Certiorari should be granted as Aetna's conduct clearly manifested assent to ASTB's counteroffer. After staff counsel requested ASTB's services, ASTB forwarded to Aetna, through staff counsel, its Service Agreement which expressly stated that "ASTB's services are extended to your firm [Aetna] *on the basis of the conditions* printed overleaf." (Emphasis added.) Staff counsel, received this agreement and never objected to any of the terms mentioned therein. In particular, staff counsel never suggested that Aetna was not, as expressly stated in the agreement, principal to the agreement. To the contrary, he further corresponded with ASTB, telephoned ASTB personnel, received ASTB's expert witness report, and caused Aetna to pay ASTB's expert services. Just as in *Costello, Thomson, Lynch,* and *Textron,* Aetna accepted, without objection, the benefits of ASTB's services. Such conduct clearly manifests an assent to ASTB's counteroffer.[5]

Indeed, it is contrary to the common law "mirror image" rule to hold that, on the one hand, ASTB's February 26th correspondence constituted a counteroffer, and, on the other hand, to say that Aetna accepted the counteroffer, exclusive of the indemnification provision or the term providing that Aetna was a party to the agreement. Either Aetna accepted the entire counteroffer, and is bound by the indemnification provision, or it rejected the counteroffer, in which instance ASTB would have never had a duty to provide expert witness services.

The indemnification clause in this case provides:

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[5] Staff counsel's trial testimony that he retained ASTB's services for Honeywell, not Aetna, is unpersuasive for two reasons. First, the Parol Evidence Rule prohibits this extrinsic evidence from altering the terms of a written contract between the parties unless the court were to find an ambiguity in the written agreement. The court having found no ambiguity, this testimony to the contrary has no legal effect. Second, it is a fundamental rule of contract formation that a contract is formed where the parties *objectively* manifest their mutual assent. In this regard, staff counsel's subjective intentions are wholly irrelevant. The undisputed, objective facts compel the conclusion that Aetna manifested its assent to ASTB's counteroffer for expert witness services.

> PURCHASER AGREES TO INDEMNIFY AND HOLD ASTB HARMLESS FROM ANY AND ALL LIABILITY, CLAIMS, DEMANDS, SUITS, DAMAGES OR COSTS OF ANY KIND AND NATURE, INCLUDING ANY AND ALL EXPENSES, LEGAL OR OTHERWISE, INCLUDING THOSE ON ACCOUNT OF INJURY OR DEATH OF PERSONS OR DAMAGE TO PROPERTY, INCLUDING LOSS OF EARNINGS OR PROFITS, FOR OR ARISING OUT OF THE TESTS, SERVICES, REPORTS, TESTIMONY, AND/OR WORK PERFORMED IN RELATION TO THE PROJECT *EVEN IF IT BE CAUSED BY THE NEGLIGENCE OR GROSS NEGLIGENCE OF ASTB, ITS AGENTS, OFFICERS, EMPLOYEES, OR OTHERWISE.* [Emphasis added.]

The New York Courts have sustained the validity of an indemnification clause that holds harmless a party for its gross negligence. *See Austro v. Niagara Mohawk Power Corp.*, 66 N.Y.2d 674, 487 N.E.2d 267, 496 N.Y.S.2d 410 (1985). The New York Court of Appeals in that case emphasized that, while certain exculpatory agreements will not protect a party from his own gross negligence, a shifting of the risks in a venture to another party by way of an indemnification will protect the contracting party even for *gross* negligence. In short, under New York law, a provision which simply shifts the source of compensation for the injured person, such as the indemnification agreement at issue here, will hold harmless a party for its gross negligence. Here, thus, the indemnification clause effectively assigns the liability for ASTB's negligence, whether gross or simple, to Aetna.

The Court of Appeals and the district court committed a clear error in refusing to find, as a matter of law, that where, as here, an agent accepts the benefits of an entity's services,

offered pursuant to express terms and conditions, without objection to those express terms and conditions, it has assented to the offer. This Court should grant certiorari not only because of the hardship that has been imposed upon the Petitioner as a result of the Court of Appeals clear error, but also because the issue presented here transcends this litigation. The Third Circuit has essentially "revised" the specific provisions in a contract between commercial entities acting at arms length. In doing this, the Third Circuit has defeated ASTB's right to rely upon the very terms pursuant to which its services were rendered. This unwarranted impairment of ASTB's contractual rights, with the far reaching consequences threatened by the Third Circuit ruling, should not be sanctioned.

CONCLUSION

For these various reasons, this Petition for Certiorari should be granted.

Respectfully submitted,

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October 24, 1988

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 88-1008

HONEYWELL, INC.

vs.

AMERICAN STANDARDS TESTING BUREAU, INC.

Appellant

vs.

AETNA LIFE & CASUALTY COMPANY

Appeal from the United States District
Court for the Eastern District
of Pennsylvania
(D.C. Civil No. 85-0158)

Submitted Under Third Circuit Rule 12(6)
June 13, 1988
Before: MANSMANN, SCIRICA, and COWEN,
Circuit Judges.

(Filed June 29, 1988)

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OPINION OF THE COURT

MANSMANN, *Circuit Judge*.

In this negligence action against American Standards Testing Bureau Inc. brought in federal court on diversity grounds, Honeywell, Inc. alleged that it suffered a loss by way of the state court judgment against it when American Standards failed to supply an expert witness to assist Honeywell in its defense of a personal injury action.

After a federal court jury found in favor of Honeywell, American Standards filed this appeal contending, *inter alia*, that the district court erred in not requiring the plaintiff to "re-create" or re-try the state court action before the federal jury instead of permitting the plaintiff to utilize expert testimony on causation to meet its burden of proof. American Standards also argued that the district court erred in

failing to instruct the jury that the former defense counsel's failure to cite *Barber v. Kohler*, 428 Pa. 219 (1968), could be contributory negligence which should be imputed to Honeywell.

We find that Honeywell was not required to prove legal causation through a reenactment of the state-court action, with the addition of the omitted expert testimony, before the federal jury. Expert opinion testimony was sufficient proof of causation. We also find that the district court's refusal to charge on *Barber* was, at best, harmless error. Under the applicable Pennsylvania law, contributory negligence is no defense to the jury's ultimate finding of wanton misconduct.

We further conclude that the district court's refusal to instruct the jury that it might find deficiencies in counsel's representation of Honeywell to be a superseding cause of Honeywell's loss in state court was not error. Any such deficiencies could be contributing causes at most and would not supersede American Standards' failure to provide an expert witness.

We also find that if the province of the federal jury was invaded by the admission of expert opinion testimony as to what the state jury would have decided if presented with the omitted evidence, any error in this regard was harmless. The jury had before it all of the evidence upon which the expert based his opinion and, therefore, the jury could fully evaluate the expert's conclusions.

Finally, we find that the evidence supports the jury's finding that the third-party defendant, Aetna Life & Casualty Co., did not contract to indemnify American Standards against its own negligence in providing services on behalf of Honeywell.

We will affirm the judgment of the district court.

I.

In May of 1978, John Ball, an employee of Bell Telephone Co. of Pennsylvania, was installing telephone lines on Honeywell's premises when the ladder upon which he was standing fell against a partition. A glass panel in the partition broke, injuring Ball's left hand.

Ball sued Honeywell in state court, claiming that his injury was caused by Honeywell's negligent use of plate glass in the office partitions, rather than safety glass or plastic panels, and by Honeywell's negligent failure to replace a metal cap evidently missing from the top edge of the glass portion of the partition against which the ladder had fallen.

Honeywell's insurer, Aetna Life & Casualty Co., assigned Joseph C. DeMaria, Esq., a salaried member of Aetna's legal staff, to defend Honeywell in the *Ball* action. Mr. DeMaria arranged for American Standards to assign an expert witness for Honeywell's defense to provide an opinion as to whether the use of plate glass in the partition violated fundamental principles of safety engineering practices.

American Standards provided DeMaria with a report bearing the name of C. F. Peck, the expert witness whom American Standards made available for trial. At the time of trial, however, counsel for Honeywell learned that Dr. Peck had not participated in the preparation of the report and could not testify to it as his own opinion. Counsel for Ball presented expert testimony that the use of plate glass was unreasonably dangerous and stressed in closing that Honeywell had been unable to produce expert testimony to the contrary. The jury returned a verdict in favor of the plaintiff and against Honeywell.

Honeywell then sued American Standards Testing Bureau in federal court, seeking compensatory and

punitive damages for American Standards' failure to provide an expert witness for Honeywell's defense in the state-court personal injury action brought by John Ball. Honeywell alleged that American Standards' breach of its duty to provide an expert witness caused Honeywell's loss of the Ball case. Actual damages were set at $300,000, the amount Honeywell paid to settle the case after verdict. In addition, Honeywell sought punitive damages against American Standards.

American Standards then filed a third-party complaint against Aetna alleging, *inter alia*, that Aetna had agreed to indemnify it against all liability arising out of work performed in connection with the *Ball* case, including liability arising from American Standards' own negligence.

The case was tried to a jury which returned verdicts in favor of Honeywell and Aetna and against American Standards. American Standards' motions for judgment n.o.v. or for a new trial were denied.

American Standards raises six contentions on appeal: (1) that the district court erred in ruling that citation of *Barber v. Kohler*, 428 Pa. 219 (1968), would not have required a directed verdict for Honeywell in the *Ball* case and in failing to instruct the jury that defense counsel's failure to cite *Barber* could be contributory negligence, which should be imputed to Honeywell; (2) that the district court erred in refusing to instruct the jury that it might find deficiencies in counsel's representation of Honeywell to be a superseding cause of Honeywell's loss in the state-court action; (3) that Honeywell was required to prove legal causation through a re-creation of the Ball trial before the jury in this case; (4) that the trial court erred in admitting expert opinion testimony regarding what a former jury would have found had it been presented with the evidence which American Standards agreed to supply; (5) that the district court

erred in failing to rule that Aetna was required to indemnify American Standards against American Standards' own negligence; and (6) that American Standards' rights were substantially prejudiced by certain of the district court's comments to the jury.

The district court had subject matter jurisdiction pursuant to 28 U.S.C. § 1332. Our appellate jurisdiction lies pursuant to 28 U.S.C. § 1291.

We will affirm the district court's denial of a judgment n.o.v. "unless the record is 'critically deficient of that minimum quantity of evidence from which the jury might reasonably afford relief.'" *Link v. Mercedes-Benz of N. America*, 788 F.2d 918, 921 (3d Cir. 1986)(citation omitted).

We review the district court's ruling on a new trial motion only for abuse of discretion unless the court's denial of the motion is based on application of a legal precept, in which case our review is plenary. *Id.*

We examine seriatim each of American Standards' contentions in accordance with the strict standard of review governing these motions.

II.

A.

American Standards contends that Honeywell did not meet its burden of proof in showing that its damage was directly caused by the actions of American Standards. It argues that expert opinion testimony was insufficient proof that American Standards' failure to provide an expert witness caused Honeywell to lose the state action. American Standards asserts that Pennsylvania law mandates that Honeywell prove legal causation by re-trying the state negligence case to the federal jury, with the addition of testimony by an expert witness who *did* contribute to the preparation of American Standards' report.

American Standards analogizes this case to attorney malpractice cases in that the complaint asserts that the defendant's conduct caused judgment to be entered against the plaintiff in an underlying action and the measure of damages is the amount of the judgment the plaintiff would have avoided in the underlying action absent the defendant's breach of duty.

Although the parties dispute whether or not Honeywell's case against American Standards may be characterized as a "professional" negligence case, the argument is something of a "red herring." The "professional" designation would raise only the standard of care to which the defendant would be held. It would not affect the plaintiff's burden of proof as to causation or damages. We agree that the analogy between attorney malpractice cases and this case requires that the plaintiff meet a similar burden of proof as to causation and damages. Although we agree that the professional negligence standard governs this case, we disagree with American Standards' reading of what that standard requires.

American Standards asserts that "Pennsylvania courts have consistently held that the plaintiff must prove proximate cause in a professional malpractice action by putting on a 'case within a case.'" Therefore, it argues that in all cases alleging that the defendant caused the plaintiff to lose a judgment, the plaintiff must prove that he would have won the prior lawsuit by actually trying the underlying case before the subsequent "malpractice" jury.

American Standards has cited a number of Pennsylvania cases affirming that, in order to establish causation and damages in a suit for attorney negligence in handling a lawsuit, a plaintiff must establish by a preponderance of the evidence that he would have been successful in the prosecution or

defense of the underlying action but for the attorney's negligence.[1]

American Standards has not cited any Pennsylvania precedent, nor has our research revealed any, which mandates actual re-creation of a prior trial to prove proximate cause in a malpractice case. The cases cited by American Standards hold generally that a malpractice plaintiff may not sue in assumpsit for nominal damages. Actual damages will be measured by the amount of the lost judgment. The plaintiff must offer evidence that would support a finding by the jury that but for the negligence complained of, the plaintiff would have been successful in the prosecution or defense of a former action. Only two of these cases give any indication of what such evidence *might* be; none, what it *must* be.[2]

No one disputes that Honeywell lost in state court and suffered damage in the entry of the judgment against it and the amount it paid in settlement. Only the fact of causation is contested, not the fact of damages. The narrow question facing us, therefore, is whether the record reveals competent evidence from which a jury might infer that American Standards' failure to provide a defense witness contributed substantially to Honeywell's loss in state court. We turn to the evidence before the district court.

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1. For example, Duke & Co. v. Anderson, 418 A.2d 613 (Pa. Super. 1980); Trice v. Mozenter, 515 A.2d 10 (Pa. Super. 1986); Shenkel v. Monheit, 405 A.2d 493 (Pa. Super. 1985); Duncan v. Lord, 409 F. Supp. 687 (E.D. Pa. 1976).

2. Duke & Co. v. Anderson, 418 A.2d 613 (Pa. Super. 1980) (underlying defamation claim apparently was tried to a jury, but nothing in the opinion suggests that this method of proof was *required*); Duncan v. Lord, 409 F. Supp. 687 (E.D. Pa. 1976) (judgment of attorney liability by default and assessment of damages through expert testimony).

Honeywell called as its principal witness its state-court defense counsel, Joseph C. DeMaria, Esq. In response to questions by counsel, and with reference to the *Ball* transcript, portions of which were admitted into evidence, DeMaria described to the jury portions of the *Ball* trial. His testimony was readily verifiable by opposing counsel through reference to the transcript.

The jury heard testimony as to the circumstances of Mr. Ball's accident, that he was injured by the glass which broke when he fell against the partition, that Ball's expert witness had testified that Honeywell's failure to equip the partition with safety glass had created an unreasonably dangerous working environment, and that this expert testimony was emphasized by counsel for Ball in his closing argument. The report prepared by American Standards was also in evidence. It stated, for example, that the glass in the offending partition was stronger than the glass normally used throughout the country in door installations, exterior glazing, and at higher elevations, and was "otherwise common to all such partition products installed in office buildings, laboratories, hospitals, schools and a variety of other buildings around the country."

Whether Honeywell had created an unreasonably dangerous condition was a material issue in the state trial. The district court jury could reasonably have concluded from this evidence that had an expert been available to testify on behalf of Honeywell and in conformity with the contents of American Standards' report, the former jury would have decided in favor of Honeywell.

B.

Honeywell also presented in the district court, Perry S. Bechtle, Esquire, an experienced trial attorney

who testified, inter alia, that in his opinion Honeywell's defense of the *Ball* case would have been successful had it been able to present expert opinion testimony based on the conclusions in the American Standards report.

American Standards objects on appeal to the expert's expression of opinion as to what the former jury would have decided if presented with the additional evidence. It argues that the jurors themselves were qualified to speculate as to the probable effect of the additional evidence.

We review the trial court's rulings on the admission of evidence only for abuse of discretion. *In re Japanese Electronic Products*, 723 F.2d 238, 260 (3d Cir. 1983), *rev'd on other grounds*, ___ U.S. ___, 106 S.Ct. 1348 (1986).

Under Rule 702 of the Federal Rules of Evidence, admission of expert testimony is rarely overturned on appeal on the ground that it is within the common knowledge of jurors.[3] Trial courts have broad discretion to admit evidence over the objection that it invades the province of the jury, and the Rule 702 standard usually favors admissibility. *United States v. Downing*, 753 F.2d 1224 (3d Cir. 1985). To the extent that American Standards' argument may be interpreted to assert a violation of Fed. R. Evid. 403.[4]

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3. Fed. R. Evid. 702 provides:

> If scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill experience, training, or education, may testify thereto in the form of an opinion or otherwise.

4. Fed. R. evid. 403 provides:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the

we find no possibility of undue prejudice. The expert's conclusions were readily verifiable by the jury, which was presented with all of the evidence upon which the expert's opinion was based. Any error in admitting this testimony was harmless.

III.

We turn to American Standards' assertion that the district court erred in not submitting to the jury the question of whether Honeywell's defense counsel's negligence was a contributing factor in causing the state-court verdict against Honeywell.

American Standards contends that had defense counsel cited *Barber v. Kohler*, 428 Pa. 219, 237 A.2d 224 (1968), the case against Honeywell would have been dismissed on the ground that its negligence, if any, was not the legal cause of Ball's injury. American Standards argues that the attorney's failure to cite the case was negligent and was a substantial factor in bringing about the adverse verdict, and that the contributory negligence of the attorney should be imputed to Honeywell.

Under Pennsylvania's Comparative Negligence Act, negligence by a plaintiff which contributes to his injury may reduce or bar his recovery against a negligent defendant. 42 Pa. C.S.A. § 7102(a)(1978).[5] Therefore,

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jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

5. 42 Pa. C.S.A. § 7102(a) provides:

§ 7102. Comparative negligence

(a) General rule.--In all actions brought to recover damages for negligence resulting in death or injury to person or property, the fact that the plaintiff may have been guilty of contributory negligence shall not bar a recovery by the plaintiff or his legal representative where such negligence was not greater than the causal negligence of the defendant

American Standards urges that it was entitled to a judgment n.o.v. or to a new trial on Honeywell's claim against it and on its third-party claim against Aetna.

The district court refused to instruct the jury on the issue of imputed contributory negligence because the judge determined as a matter of law that *Barber v. Kohler* was of questionable precedential value and was distinguishable from the *Ball* case.

We need not review that legal determination. If there was any error in the district judge's failure to charge the jury on contributory negligence, the error was harmless.

Errors are harmless, and may not be grounds for disturbing a judgment or order of the court, if it is highly probable that a party's substantial rights were not affected. Fed. R. Civ. P. 61; *McQueeny v. Wilmington Trust*, 779 F.2d 916, 923-28 (3d Cir. 1985).

We note at the outset that imputed contributory negligence is a fiction of law enjoying little favor with the courts and having been largely discredited. Restatement (Second) Torts § 485 comments a & b (1965); 65 A. C.J.S. Negligence § 157 (1955). We doubt that, where the client is not alleged to have exercised any actual control over the conduct of the litigation, Pennsylvania courts would impute to a client, as a defense to one who has injured the client, an attorney's failure to exercise reasonable care in conducting litigation on the client's behalf.

Furthermore, under the remaining vestiges of the doctrine, a servant's negligence bars his master from recovery against a negligent third party only to the extent that the master would be barred if the

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or defendants against whom recovery is sought, but any damages sustained by the plaintiff shall be diminished in proportion to the amount of negligence attributed to the plaintiff.

negligence were his own. Restatement (Second) Torts § 486, comment a (1965).

In the leading case of *Kasanovich v. George*, 348 Pa. 199, 34 A.2d 523 (1943), the Supreme Court of Pennsylvania adopted the doctrine now set forth in Restatement (Second) of Torts, §§ 500, 501(1), that a plaintiff's contributory negligence is not a bar to his recovery if the defendant is guilty of wanton misconduct. Honeywell argues that because the jury found that American Standards acted with reckless indifference to the risk to Honeywell, it therefore is barred by its own wanton misconduct from relying on the defense of contributory negligence.

The Pennsylvania Comparative Negligence Act is silent on the doctrine of wanton misconduct. The cases discussing the doctrine after the passage of the Act have not treated the doctrine as having been subsumed or altered by the Act. *See Rosa v. United States*, 613 F. Supp. 469 (M.D. Pa. 1985); *Vargus v. Pitman Mfg. Co.*, 510 F. Supp. 116, 120 (E.D. Pa. 1981), *aff'd*, 673 F.2d 1304 (3d Cir. 1981), *reh'g denied*, 675 F.2d 73 (3d Cir. 1982); *Stubbs v. Frazer*, 32 D. & C. 3d 495 (1981).

Under the Act, a plaintiff's contributory negligence is a complete defense only when it exceeds the degree of the defendant's negligence. Under the common law, contributory negligence, however slight, was a total bar. *Kasanovich v. George*, 348 Pa. at 202, 34 A.2d at 525. The purpose of the Act plainly is to give negligent plaintiffs greater opportunity for recovery. We discern no intention to diminish a negligent plaintiff's opportunity of total recovery against a defendant who engages in wanton misconduct. In *Evans v. Philadelphia Transportation Co.*, 418 Pa. 567, 574, 212 A.2d 440, 443 (1965), the Supreme Court of Pennsylvania in distinguishing between "willful" misconduct and "wanton" misconduct, quoted with

approval the following definition of wanton misconduct:

> Wanton misconduct . . . means that the actor has intentionally done an act of an unreasonable character, in disregard of a risk known to him or so obvious that he must be taken to have been aware of it, and so great as to make it highly probable that harm would follow. It usually is accompanied by a conscious indifference to the consequences. . . .

Prosser, Torts § 33 at 151 (2d ed. 1955).

Responding to special interrogatories, the jury found that defendant American Standards was "grossly negligent" in performing its expert services for Honeywell. The jury had been instructed by the trial court that it could find American Standards grossly negligent only if it found that American Standards had falsely represented that Dr. Peck was qualified to testify and had participated in the formulation of the opinions expressed in the report, and that "they were in such careless indifference of the truth that it was malicious."

By finding that American Standards was grossly negligent in accordance with the court's instruction, the jury found that American Standards' conduct was "wanton" as the term has been defined by the Pennsylvania Supreme Court. Furthermore, the jury awarded punitive damages against American Standards, having been instructed that it could do so only if it found that "the defendant acted with malice, willfulness, callous, or reckless indifference to the rights of the plaintiff."

Therefore, even if Honeywell's attorney was negligent, and even if that negligence might be imputed to Honeywell – questions of Pennsylvania law which we need not decide – the rule in *Kasanovich v.*

George prevents American Standards from relying on a contributory negligence defense to its own wanton misconduct. Consequently, if there was any error in the district judge's failure to charge the jury on contributory negligence, the error was harmless.

IV.

American Standards also argues that the jury should have been given the opportunity to find that the various asserted errors by defense counsel constitute a "supervening" cause of Honeywell's loss in state court.

We interpret this contention to mean that defense counsel's errors were an intervening force which operated as a superseding cause of the judgment against Honeywell. An intervening force is one which is operative in producing harm after another's negligence has placed the victim in peril. Restatement (Second) Torts § 441. An intervening force may be a superseding cause, that is, it may relieve the original negligent actor of responsibility for the victim's injuries. *See id.* at § 442.

An intervening force is not a superseding cause where the original negligent act or omission creates or increases the foreseeable risk of harm through the intervention of another force. Restatement (Second) Torts, § 442 A (1965). The failure of American Standards to provide Honeywell with an expert witness for its defense was a force continuing throughout the trial which substantially increased the foreseeable risk of an adverse verdict regardless of the degree of skill exhibited by Honeywell's attorney. Any defect in counsel's representation of Honeywell was at most a concurrent contributing cause of the unfavorable state-court verdict. It was not a superseding cause of harm. *See* Restatement (Second) Torts, §§ 440-442 (1965). American Standards' conduct need not have

been the *only* cause of the verdict in order for the jury to find causation. That it was a substantial contributing factor is sufficient. *Whitner v. Von Hintz*, 437 Pa. 448, 456-58, 263 A.2d 889, 893-94 (1970).

V.

Next we address the contention that Aetna agreed to indemnify American Standards against any liability arising from the services rendered on behalf of Honeywell, and that the district court interpreted incorrectly the indemnification clause.

American Standards argues that Attorney DeMaria acted as Aetna's agent in employing American Standards to render services on behalf of Honeywell, and that therefore Aetna was a party to the contract. American Standards asserts that an indemnification clause, which was contained in the "Terms and Conditions" form attached to a letter of February 26, 1982 from American Standards to Aetna, became part of the contract. The letter was sent by American Standards to DeMaria's attention at Aetna's offices, acknowledging DeMaria's request and stating that "services are extended to your firm on the basis of the conditions printed overleaf."

Aetna argued in district court, however, that the clause was not part of any enforceable agreement between Aetna and American Standards. Question 7 of the special interrogatories to the jury read as follows:

> Did defendant ASTB [American Standards] prove by a preponderance of the evidence that third-party defendant Aetna contracted to hold defendant ASTB harmless for negligence for the rendering of its services in the case of *Ball v. Honeywell*?

With respect to that interrogatory, the trial judge instructed the jury:

> "If you find from all the circumstances that the parties intended to -- that they agreed that the written form was their agreement, then you should answer "Yes."

The jury answered "No."

If there was evidence from which the jury could have found that the indemnity clause was not a term of any agreement between American Standards and Aetna, then interpretation of the clause was unnecessary.

Under Pennsylvania law, a reply which suggests changes or additions to the terms of an offer may be either an acceptance or a counteroffer, and the question is for the jury to decide. *DeMoss v. Beryllium Corp.*, 358 Pa. 470, 58 A.2d 70, 72 (1948). The common law rule is that "a reply to an offer which purports to accept but is conditional on the offeror's assent to terms additional to or different from those offered is not an acceptance but is a counter-offer." Restatement (Second) Contracts § 59 (1981); *Hedden v. Lupinsky*, 176 A.2d 406, 405 Pa. 609 (1962).

The record, viewed in the light most favorable to Aetna, contains no evidence that an offer to indemnify was a part of DeMaria's request for American Standards' services, nor is there any evidence that American Standards' condition of indemnification was accepted by DeMaria or by Aetna. Therefore, the evidence supports the jury's finding that no contract containing an indemnification term existed between Aetna and American Standards.

VI.

We have examined the remaining challenge to comments of the district judge to the jury. We find American Standards' contentions regarding the

likelihood of substantial prejudice from these comments to be without merit.

VII.

In accordance with the foregoing, we will affirm the judgment of the district court.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

HONEYWELL, INC. — CIVIL ACTION

v.

AMERICAN STANDARDS
TESTING BUREAU, INC. — No. 85-0158

v.

AETNA LIFE & CASUALTY CO.

MEMORANDUM AND ORDER

KELLY, J. — February 27, 1987

Defendant, American Standards Testing Bureau, (ASTB), has filed a motion for summary judgment against plaintiff Honeywell, Inc. (Honeywell), pursuant to Fed. R. Civ. P. 56(b), and a motion for summary judgment against third party defendant Aetna Life & Casualty Company (Aetna) pursuant to Fed. R. Civ. P. 56(a).

Plaintiff Honeywell was sued by an employee of Bell Telephone Company for personal injuries sustained when the employee fell from a ladder while working on Honeywell's property. Aetna insured Honeywell against such claims. The name of the underlying action was *Ball v. Honeywell.* While preparing for trial, ASTB was hired "to assign an expert to review the facts and circumstances of the (*Ball*) case ... toward the possibility that expert testimony might be available ...." Complaint at 2-3.[1] ASTB supplied Honeywell's counsel with an expert report signed by C. F. Peck and V.

[1] It is clear that ASTB entered into a contract to perform services in the *Ball* Case. It is not clear, however, who ASTB entered into this contract with (Honeywell and/or Aetna).

Morfopoulos. *Id.* During the trial Honeywell's counsel decided that this report was flawed and did not use it or the testimony of ASTB's experts. The jury returned a verdict in favor of the plaintiff and against Honeywell, in the amount of $250,000; delay damages were assessed in the amount of $81,369.86. Both parties, however, agreed to settle the case for $306,369.36.

Honeywell alleges (1) that "ASTB intentionally misled Honeywell . . . to believe that Dr. Peck had co-authored the report . . . and that he was familiar with the case as of March 1982 . . . ." *Id.* at 7; (2) that "ASTB intentionally and with gross negligence concealed from Honeywell . . . the fact that the individual who had done the physical inspection . . . had subsequently had a stroke and was available neither to testify nor to assist." *Id.;* and, (3) if "ASTB had performed its services in accordance with the proper and customary standards of its business and profession . . . the case would have resulted in a verdict for Honeywell." *Id.* at 8. As noted above defendant ASTB alleges that these claims should be summarily dismissed. ASTB has brought a third-party complaint against Aetna, Count I of which states in part "Aetna . . . is liable to indemnify and hold ASTB harmless from Honeywell's suit herein and is liable to ASTB for any and all damages . . . which ASTB has or will incur in or as a result of Honeywell's complaint." Third-Party Complaint at 4. ASTB alleges that it is entitled to summary judgment on this count.

Rule 56(c) instructs a district court to enter summary judgment when the record reveals that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. This rule provides the court with a useful tool when the critical facts are disputed, facilitating the resolution of a pending controversy without the expense and delay of conducting a trial made unnecessary by the absence of factual dispute. *Peterson v. Lehigh Valley Dist. Council, United Brotherhood of Carpenters & Joiners,* 676 F.2d 81, 84 (3d Cir. 1982); *Goodman v. Mead Johnson & Co.,* 534 F.2d 566, 573 (3d. Cir. 1976), *cert. denied,* 429 U.S. 1038 (1977). Disposing

of a matter by summary judgment is inappropriate, however, where the evidence before the court reveals a genuine factual disagreement requiring submission to a jury. *Anderson v. Liberty Lobby, Inc.,* U.S. , , 106, S.Ct. 2505, 2512 (1986). "[E]ven if the preponderance of the evidence should appear to lie on the moving party's side, the court's function is not to decide the issues of fact, but only to determine whether any issue of fact exists to be tried." *Ness v. Marshall,* 660 F.2d 517, 519 (3d Cir. 1981). Where a factual disagreement exists, a trial is necessary to resolve the conflict. *Peterson,* 676 F.2d at 84.

In petitioning for summary judgment, the moving party bears the burden of identifying for the district court those portions of the record which demonstrate the absence of a genuine issue of material fact. *Celotex Corp. v. Catrett,* , U.S. , , 106 S.Ct. 2548, 2553 (1986). Following such a showing, the burden then shifts to the nonmoving party who must present affirmative evidence from which a jury might reasonably return a verdict in his favor. *Id.* at 2553-54; *Anderson,* 106 S.Ct. at 2514; *Matsushita Electric Industrial Co. v. Zenith Radio Corp.,* 475 U.S. , 106 S.Ct. 1348 (1986). In making its ruling, the court must review all inferences in the light most favorable to the nonmoving party. *Continental Ins. Co. v. Bodie,* 682 F.2d 436, 438 (3d Cir. 1982), *Hollinger v. Wagner Mining equip. Co.,* 667 F.2d 402, 405 (3d Cir. 1981), and must take as true all allegations of the nonmoving party which conflict with those of the movant, *Anderson,* 106 S.Ct. at 2513.

ASTB's Arguments for Summary Judgment

(1) ASTB urges this court to summarily dismiss Honeywell's claim because its acts and/or omissions were not the proximate cause of Honeywell's loss of the *Ball* case. More specifically, ASTB states "regardless of the reason that ASTB did not testify at the . . . trial and regardless of whose fault it may have been that ASTB did not testify at that trial, the lack of the testimony . . . was not . . . the *proximate cause* of

Honeywell's loss of the *Ball* case." Brief of ASTB in Support of its Motion for Summary Judgment against Honeywell at 20 (emphasis added). The deposition testimony of Perry Bechtle, plaintiff's expert witness, however, rebuts this causation argument. Mr. Bechtle stated at his deposition that the actions of Dr. Peck considerably reduced Honeywell's chances of success in the *Ball* case. In light of this deposition testimony, a genuine issue exists as to the material fact of causation.

(2) ASTB next urges this court to grant summary judgment since "Honeywell has been unable to produce any evidence from which the trier may find that ASTB *intentionally* deceived Honeywell." *Id.* at 32 (emphasis added). Both parties admit that C. F. Peck signed the expert report submitted by ASTB to Honeywell in the *Ball* case. However, in his deposition C. F. Peck stated that he had *no* involvement in the *Ball* case, had never heard of it until the date of his deposition and has not participated in writing the report. A jury may infer from these statements that by having C. F. Peck sign the report ASTB *intentionally* misled Honeywell to believe that C. F. Peck has participated in the preparation of the report. Plaintiff's claim of intentional harm, therefore, will not be summarily dismissed.

(3) ASTB next alleges that it is entitled to summary judgment on Honeywell's negligence and gross negligence claims and on Count I of its complaint against AETNA in light of the exculpatory clause contained in its contract with Aetna and/or Honeywell".[2] More specifically, ASTB alleges summary

[2] The clause in question states:

> PURCHASER AGREES TO INDEMNIFY AND HOLD ASTB HARMLESS FROM ANY AND ALL LIABILITY, CLAIMS, DEMANDS, SUITS, DAMAGES OR COSTS OF ANY KIND AND NATURE, INCLUDING ANY AND ALL EXPENSES, LEGAL OR OTHERWISE, INCLUDING THOSE ON ACCOUNT OF INJURY OR DEATH OF PERSONS OR DAMAGE TO PROPERTY, INCLUDING LOSS OF EARNINGS OR PROFITS, FOR OR ARISING OUT OF THE TESTS, SERVICES, REPORTS, TESTIMONY, AND/OR WORK PERFORMED IN RELATION TO THE PROJECT EVEN IT BE CAUSED BY THE NEGLIGENCE OR GROSS NEGLIGENCE OF ASTB, ITS AGENTS, OFFICERS, EMPLOYEES, OR OTHERWISE.

judgment against Honeywell and Aetna is inappropriate since Aetna *and* Honeywell agreed "to hold ASTB harmless from . . . all claims for negligence and/or gross negligence." *Id.* at 40. This argument is without merit.

Under New York law[3] *indemnification* agreements which "simply shift the source of compensation without restricting the injured party's ability to recover" are "unenforceable as violative of public policy *only* to the extent that they purport to indemnify a party for damages flowing from the *intentional* causation of injury." *Austro v. Niagara Mohawk Power Corp.*, 487 N.E. 2d 267 (N.Y. 1985). However, *exculpatory clauses* which typically deprive a contracting party of the right to recover damages suffered as the result of the exonerated party's tortious act are wholly void as to willful or grossly negligent acts. *Gross v. Sweet*, 424 N.Y.S. 2d 365, 368 (1979). Furthermore, *exculpatory clauses* for negligent acts will be considered valid only if they meet the exacting standards developed by New York courts.

As noted above, it is not clear who entered into the contract with ASTB. However, ASTB itself stated that it "is undisputed in this action, [that] *Honeywell/Aetna had agreed* when it retained ASTB to hold ASTB harmless from, among other things, all claims for negligence and/or gross negligence." Brief of ASTB in Support of its Motion for Summary Judgment against Honeywell at 40. The clause, therefore, is an *exculpatory* clause and not an *indemnification* clause since as ASTB interprets it, it deprives both Honeywell and Aetna the right to recover. Therefore, it is void as to willful or grossly negligent acts. Furthermore, as noted above, an exculpatory clause for negligent acts will be considered valid only if it meets certain standards developed by the New York courts.

The exculpatory clause must be clear, coherent and written in "unmistakable language", *Gross v. Sweet*, 424 N.Y.S. 2d 365

[3] Paragraph IX of the contract entered into by ASTB with Honeywell and/or Aetna contained a New York choice of law provision which all parties agree is controlling.

368 (1979), and should not "compel resort to a magnifying glass and lexicon." *Id.* After reviewing the exculpatory clause I find that there is a genuine issue as to whether the clause "compels resort to a magnifying glass and lexicon." *Id.* This exculpatory clause, therefore, will not support a summary judgment against Honeywell. Likewise, ASTB's motion for summary judgment against Aetna based on this clause is denied.

(4) Finally, ASTB alleges that it is entitled to summary judgment since Honeywell still has a cause of action against the ladder manufacturer for indemnification. ASTB argues that the existence of this potential cause of action precludes this court from finding that Honeywell has been damaged. ASTB also alleges that Honeywell failed to mitigate its damages by not bringing an action against the ladder manufacturer. Paul Alamar, plaintiff's ladder expert, avered that "the ladder in this case was not defective in design or manufacture." Affidavit of Paul Alamar at 5. This expert opinion makes recovery on an indemnification claim against the ladder manufacturer questionable at best and certainly not an occurrence on which to base the granting of a motion for summary judgment.

An order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

HONEYWELL, INC. — CIVIL ACTION

v.

AMERICAN STANDARDS
TESTING BUREAU, INC. — No. 85-0158

v.

AETNA LIFE & CASUALTY CO.

ORDER

AND NOW, this 27th day of February, 1987, for the reasons set forth in the foregoing Memorandum, it is ORDERED that defendant American Standard Testing Bureau, Inc.'s motions for summary judgment against Honeywell, Inc. and Aetna Life & Casualty Co. are denied.

BY THE COURT:

/s/ JAMES MCGIRR KELLY, J.

James McGirr Kelly, J.

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

HONEYWELL, INC. — CIVIL ACTION

v.

AMERICAN STANDARDS TESTING BUREAU, INC. — NO. 85-0158

v.

AETNA LIFE & CASUALTY CO.

MEMORANDUM AND ORDER

J. M. KELLY, J. — December 7, 1987

Defendant American Standards Testing Bureau, Inc. (ASTB) has moved, pursuant to Fed. R. Civ. P. 50(b), for a judgment notwithstanding the verdict (JNOV), or alternatively, pursuant to Fed R. Civ. P. 59, for a new trial, against plaintiff Honeywell, Inc. (Honeywell) and third-party defendant Aetna Life & Casualty Co. (Aetna). The following are the alleged facts which led to this suit.

Honeywell was sued by an employee of Bell Telephone Company for personal injuries sustained when the employee fell from a ladder while working on Honeywell's property. Aetna insured Honeywell against such claims. The name of this action was *Ball v. Honeywell.* While preparing for trial, ASTB was hired "to assign an expert to review the facts and circumstances of the *(Ball)* case . . . toward the possibility that expert testimony might be available . . . ." Complaint at 2-3.[1] ASTB

[1] Federal Rule of Evidence 702 provides: [i]f scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence *or to determine a fact in issue,* a witness *qualified as an expert by knowledge, skill, experience, training, or education,* may testify thereto in the form of an opinion or otherwise.'

(emphasis added).

supplied Honeywell's counsel with an expert report signed by C. F. Peck and V. Morfopoulos. *Id.* During the trial Honeywell's counsel decided that this report was flawed and did not use it or the testimony of ASTB's experts. The jury returned a verdict in favor of the plaintiff and against Honeywell, in the amount of $250,000; delay damages were assessed in the amount of $81,369.86. Both parties, however, agreed to settle the case for $306,369.36.

Honeywell then brought the present action and alleged: (1) that "ASTB intentionally misled Honeywell . . . to believe that Dr. Peck had co-authored the report . . . and that he was familiar with the case as of March 1982 . . . ." *Id.* at 7; (2) that "ASTB intentionally and with gross negligence concealed from Honeywell . . . the fact that the individual who had done the physical inspection . . . had subsequently had a stroke and was available neither to testify nor to assist." *Id.;* and (3) if "ASTB had performed its services in accordance with the proper and customary standards of its business and profession . . . the case would have resulted in a verdict for Honeywell." *Id.* at 8. As noted above defendant ASTB alleges that these claims should be summarily dismissed. ASTB has brought a third-party complaint against Aetna, Count I of which states in part "Aetna . . . is liable to indemnify and hold ASTB harmless from Honeywell's suit herein and is liable to ASTB for any and all damages . . . which ASTB has or will incur in or as a result of Honeywell's complaint." Third-Party Complaint at 4. ASTB alleges that it is entitled to summary judgment on this count.

After a jury trial, judgment was entered in favor of plaintiff Honeywell and against defendant ASTB in the amount of $319,900. Judgment was also entered in favor of third-party defendant Aetna and against ASTB. Before discussing each contention raised by ASTB in the present motion, it is important to distinguish between a motion for a JNOV and a motion for a new trial.

It is well settled that a motion for JNOV must be granted cautiously and is appropriate only in very limited circumstances. Furthermore:

> [t]o grant a motion for judgment N.O.V., the court must find as a mater of law that the plaintiff failed to adduce sufficient facts to justify the verdict. The motion 'may be granted only when without weighing the credibility of the evidence, there can be but one reasonable conclusion as the proper judgment." *Where there is conflicting evidence which would lead to inconsistent conclusions, a judgment N.O.V. should not be granted.* In considering the motion, the court must view the evidence in the light most favorable to the party against whom the motion is made . . . .

Marian Bank v. Intern. Harvester Credit Corp., 550 F.Supp. 456, 460 (D.C. Pa. 1982) (citations omitted) (emphasis added).

A court will not grant a motion for a new trial unless the moving party establishes: (1) that prejudicial error has crept into the record, or (2) that substantial justice has not been done. *W.A. Wright, Inc. v. KDI Sylvan Pools, Inc.*, 569 F.Supp. 589, 594 (D.C.N.J. 1983).

I. ASTB's MOTION FOR A JNOV OR ALTERNATIVELY FOR A NEW TRIAL AGAINST HONEYWELL

As noted above Honeywell alleged that it lost the *Ball v. Honeywell* case due to ASTB's negligence, gross negligence and intentional misconduct. Complaint at ¶ 31. The jury found that Honeywell proved "by clear and convincing evidence that defendant ASTB was grossly negligence in providing expert services to Honeywell." Interrogatories to Jury Question 2.

ASTB initially argues that Honeywell failed to prove that there was privity of contract between Honeywell and ASTB. Therefore, ASTB agrees that it was not proven that it owed a

duty to Honeywell. Brief of ASTB in support of its Motion for JNOV Against Plaintiff or Alternatively for a New Trial at 5.

Mr. DeMaria, the attorney who defended Honeywell in the *Ball v. Honeywell* trial, testified at this trial that ASTB entered into a contract with Honeywell to provide Honeywell with expert services. N.T. 2-12. Furthermore, ASTB admitted that it was contacted by counsel for Honeywell/Aetna and was asked to render an expert opinion concerning issues in the *Ball v. Honeywell* case. Answer of ASTB at ¶ 10. ASTB also admitted that it submitted such a report to counsel for Honeywell/Aetna. *Id.* at ¶ 11-12. In light of this testimony by Mr. DeMaria and these admissions by ASTB it was reasonable for the jury to find that ASTB owed a duty to Honeywell.

ASTB next argues that a JNOV or new trial should be granted since "Honeywell has failed to prove that any acts or omissions of ASTB proximately caused Honeywell's loss of the *Ball v. Honeywell* case." Brief of ASTB in Support of its Motion for JNOV Against Plaintiff or Alternatively for a New Trial at 5. More specifically, ASTB argues that: (1) Honeywell did not prove the case within a case. Honeywell had to try "the *Ball v. Honeywell* case to the jury in this case, with the only difference from the original *Ball v. Honeywell* trial being the addition of ASTB's testimony by a qualified ASTB expert . . . ." *Id.* at 7; (2) Honeywell's expert witness Perry S. Bechtle's testimony was insufficient to show proximate cause; and (3) the evidence in the *Ball v. Honeywell* case was overwhelmingly in favor of the plaintiff thus the absence of ASTB's expert testimony was harmless.

To prove causation, Honeywell did not have to try the *Ball v. Honeywell* case within this case. "To prove actual injury, plaintiff [Honeywell had to] . . . demonstrate that [it] would have prevailed in the underlying action [*Ball v. Honeywell*] in the absence of defendant's [ASTB] alleged negligence." *Gans v. Gray*, 612 F. Supp. 608, 617 (D.C. Pa. 1985) A plaintiff can

establish "actual injury" through the testimony of a qualified expert witness.[2]

At trial Honey presented the expert testimony of Perry S. Bechtle. Mr. Bechtle testified: (1) that he had been a lawyer for the past thirty-five years and for the last twenty years the cases he had tried, almost all involved the testimony of at least one expert witness; (2) that he had taught evidence at Temple Law School and trial practice at Villanova Law School; (3) that he had conducted seminars in trial practice for the National Institute of Trial Advocacy, N.T. 2-22.; (4) that he had conducted programs on the use of expert testimony in the engineering field for Pennsylvania College of Trial Judges, NT. 2-23; and (5) that he was a member of numerous organizations honoring excellence in trial advocacy. N.T. 2-24. This testimony qualified Mr. Bechtle under Rule 702 to testify as an expert on the standards of care applicable to expert services.

Mr. Bechtle, after testifying that he had reviewed various depositions taken in the *Ball v. Honeywell* case as well as portions of the trial transcript, also testified that "the rendering of the report (by ASTB) in these circumstances did fall below even the minimal standards of people who hold themselves out as expert witnesses or experts in litigated matters, such as Ball versus Honeywell." N.T. 2-30. Mr. Bechtel further testified "that while nobody could be certain, *I think within legal certainty, that the Defendant Honeywell would have won the case (Ball v. Honeywell)*, had Dr. Peck done the things that the letter of March 25, 1982 suggested he did and . . . Mr. DeMaria was able to present him as a witness for the jury to hear his opinion and the reason for that opinion." N.T. 2-45-46 (emphasis added).

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[2] Federal Rule of Evidence 702 provides: [i]f scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence *or to determine a fact in issue*, a witness *qualified as an expert by knowledge, skill, experience, training, or education*, may testify thereto in the form of an opinion or otherwise.'

(emphasis added).

This testimony by a qualified expert witness then viewed in the light most favorable to Honeywell provides a basis from which a jury would reasonably find that ASTB's acts and omissions caused Honeywell to lose the *Ball v. Honeywell* case.

ASTB next argues that Honeywell "[h]as failed to prove by *clear and convincing evidence* that ASTB acted grossly negligently in the promulgation of its report." ASTB's Brief in Support of its Motion for JNOV or for a New Trial against Honeywell at 19 (emphasis added). ASTB points out that: (1) Although Dr. Peck testified that he did not write the March 25, 1982 report, he also testified that he may have had substantive input into the evaluation and formulation of the opinions expressed in that report, and (2) that Mr. Bechtle was not qualified to testify as an expert on the standards applicable to "expert" services and that his testimony was unsupported by the facts of record.

It was established at trial that Dr. Peck's signature appeared on the March 25, 1982 expert report. N.T. 1-70. It was also established at trial that Dr. Peck did not write this report or participate in its preparation. N.T. 2-9. This evidence when viewed in the light most favorable to Honeywell provides a basis from which a jury could find that Honeywell had proven by clear and convincing evidence that ASTB had acted with gross negligence. Furthermore, I have already discussed the reason why Mr. Bechtle was qualified to testify as an expert on the standard of care applicable to expert services. *See supra*, pgs. 4-5.

ASTB next argues that Honeywell failed to prove that its willfully and wantonly misrepresented Dr. Peck's involvement in ASTB's activities. ASTB argues that there was no misrepresentation in that "the ASTB report states that the corporation, ASTB, did certain things, and ASTB did do those things . . . ." ASTB's Brief in Support of its Motion for JNOV or Alternatively for a New Trial at 22. ASTB also argues that even if there was a misrepresentation, it was not material nor

was it justifiably relied upon by Honeywell. More specifically ASTB points out that

> DeMaria himself admits that all his substantive conversations were with Dr. Morfopoulos and never Dr. Peck, he never heard of Dr. Peck before the report was received, it had always been Dr. Morfopoulos who had said he would take responsibility for the engagement and would do the things necessary, and that DeMaria *himself* understood that it was Dr. Morfopoulos who visited the Honeywell plant.

Id. ASTB argues that a new trial must be granted since: (1) the court failed to properly instruct the jury on these issues; (2) the court failed to focus and limit the jury's inquiry on these issues; and (3) improper interrogatories were submitted to the jury on these issues. *Id.* at 24.

ASTB's expert report on March 25, 1982, which was introduced at trial as plaintiff's Exhibit Five, *see* N.T. 1-69, provided "[p]ursuant to your recent request, ASTB/ Philadelphia conducted an examination of certain evidence allegedly involved in captioned ladder fall accident [*Ball v. Honeywell*] .... We visited the Honeywell premises in Fort Washington and examined the site of Mr. Ball's fall." This report bore this signature of C. F. Peck "Project Engineer." At trial, however, Dr. Peck testified that he had not signed this report or participated in its information. Furthermore, Dr. Peck testified that he did not examine the accident site until almost one year after the expert report was prepared and sent to Mr. DeMaria. N.T. 2-9-11.

Viewing this evidence in the light most favorable to Honeywell I find that a reasonable person could conclude that ASTB willfully and wantonly made a material misrepresentation to Honeywell that Dr. Peck participated in the preparation of the expert report and had visited the accident site before the preparation of the report. Furthermore, based on the wording of this report one would reasonably find that

Honeywell was justified in relying on these misrepresentations. I also find that this court's charge to the jury concerning fraudulent misrepresentation was in accordance with applicable law. *Compare* Pennsylvania suggested Standard Civil Jury Instructions §13.16 with N.T. 7-33-35. Furthermore, the specific interrogatory concerning gross negligence which was submitted to the jury was clear, concise and correct.

ASTB next argues that "[a] new trial must be granted because of [numerous] prejudicial statements made in the court's opening statement to the jury". *See*, ASTB's Brief in Support of its Motion for JNOV or Alternatively for a New Trial at 24. This argument is without merit. If any incorrect statements were made by this court during the course of the opening remarks, they were corrected by the curative statement made by this court after ASTB's counsel objected. *See* N.T. 1-15-20. Therefore, if any misstatements were made, they did not prejudice the jury.

ASTB next argues that a new trial must be granted because this court refused to admit ASTB's Exhibit B-14 into evidence. *See*, ASTB's Brief in Support of its Motion for JNOV or Alternatively for a New Trial at 25. ASTB alleges that Exhibit B-14 is a letter from Mr. DeMaria to Robert Lazzapina and that it contains an admission by DeMaria that he viewed only Dr. Morfopoulos (and not Dr. Peck) as his expert. Honeywell, however, argues that "[t]he Court properly refused to admit this letter into evidence because ASTB failed to establish any grounds for its admissibility. At no time during a day and half of cross-examining Dr. DeMaria did ASTB attempt to introduce B-14." Plaintiff's Brief in Opposition to Defendant's Motion for a JNOV or Alternatively for a New Trial at 20.

The trial transcript in this case was over seven hundred pages long. ASTB has not indicated, in its brief in support of its motion, at what page the court's ruling on the admittance or exclusion of Exhibit B-14 can be found.[3] Furthermore, ASTB in

[3] I reviewed these transcripts and found discussion of Exhibit B-14 at N.T. 6-11 but no ruling excluding it.

its reply brief has failed to rebut Honeywell's allegations that this exhibit was never offered for DeMaria's authentication. Therefore, I find that ASTB has not established that a new trial is warranted based on the alleged exclusion of Exhibit B-14.

ASTB next argues that a new trial must be granted since "[t]he court erred in refusing to submit the issue of contributory negligence on the part of Honeywell to the jury." ASTB's Brief in Support of its Motion for JNOV or Alternatively for a New Trial at 26. Mr. Bechtel testified that Honeywell's lawyer, Mr. DeMaria, acted properly in defending the *Ball* case. *See* N.T. 2-59. Furthermore, ASTB's own expert, Mr. McCabe, explicitly stated that he was *not* offering any testimony as to whether or not Mr. DeMaria was negligent in defending the *Ball* case. N.T. 5-133. After reviewing the rest of the testimony presented at this trial by all of the parties I find that there was *no* evidence from which one could reasonably conclude that plaintiff Honeywell acted negligently in its defense of the *Ball v. Honeywell* case.

ASTB next argues that "the issue of punitive damages should not have been submitted to the jury and the punitive damages verdict must be stricken." ASTB's Brief in Support of its Motion for JNOV or Alternatively for a New Trial at 26. ASTB argues that the jury could not properly determine the amount of punitive damages since no evidence was introduced establishing the net worth or financial condition of ASTB. N.T. 7-56.

Evidence of a company's financial condition is admissible in order to determine whether an award of punitive damages is excessive. *Brink's, Inc. v. City of New York,* 717 F.2d 700, 706 (2d Cir. 1983). However, the introduction of such evidence is not a prerequisite to the award of punitive damages. Therefore, it was improper for this court to submit the issue of punitive damages to the jury. Furthermore, in light of the evidence concerning the extent of ASTB's operations, *See* N.T. 4-183, I find that an award of $13,900 in punitive damages was not excessive.

ASTB next argues that this court "[s]hould enter judgment NOV in favor of ASTB based upon *Barber v. Kohler*, or, alternatively, grant ASTB a new trial because the court erred regarding the applicability of and testimony about *Barber v. Kohler*." ASTB's Brief in Support of its Motion for JNOV or Alternatively for a New Trial at 27.

I limited testimony on the *Barber* case because I found that facts in *Barber* were distinguishable from the *Ball* case. Furthermore, there was a question as to whether the *Barber* case was still good law at the time the *Ball* case was tried. After again reviewing the facts in *Barber*, I find that they are distinguishable from the facts in *Ball* and that testimony concerning the *Barber* case would only have served to confuse or mislead the jury.

ASTB next argues that a new trial should be granted since

> the court erred in permitting Perry C. Bechtel, Esquire . . . to testify as an expert in this action as to:
>
> (a) that the actions of ASTB fell below the applicable standards of the industry;
>
> (b) that the *Ball* case would have been won had the ASTB testimony been given in that trial; and
>
> (c) the meaning of the ASBT [sic] report and the language therein.

ASTB's Brief in Support of its Motion for JNOV or Alternatively for a New Trial at 27-28.

For the reasons discussed above (pgs. 4-5), I find that Perry Bechtle was qualified, pursuant to Fed. R. Evid. 702 and 703, to testify as an expert as to: (1) the standards of care applicable to expert services, and (2) the effect of the omission of ASTB's expert report on the outcome of the Ball case.

ASTB next argues that it was severely prejudiced by this court's instructions to the jury and that a new trial is warranted. ASTB argues that the court erred when it:

(a) failed to give ASTB's requested jury instructions;

(b) failed to charge the jury on the issue of 'duty', including without limitation Honeywell's burden to prove what ASTB's duty, if any, was to Honeywell and that ASTB breached that duty;

(c) charged the jury that the whole relationship between Honeywell and ASTB was involved, not just the issue of Charles Peck's involvement in the formulation of the opinions set forth in the ASTB report;

(d) failed to instruct the jury properly and adequately on proximate cause, including without limitation regarding 'substantial factor';

(e) failed to instruct the jury that in order to recover herein, Honeywell, Inc. had to prove that it would have won the *Ball v. Honeywell* case had the ASTB testimony been given in that case;

(f) failed to instruct the jury properly and adequately on the issue of 'clear and convincing, and indubitable' evidence;

(g) failed to instruct the jury properly and adequately on the issue of 'gross negligence';

(h) failed to instruct the jury on the issue of justifiable reliance;

(i) failed to instruct the jury properly and adequately on the issue of burden of proof as to *each* element required to be proven by Honeywell;

(j) failed to instruct the jury that if Charles Peck had had any substantive input into the formulation of the opinions expressed in the ASTB report, the jury must find in favor of ASTB on all Counts;

(k) charged the jury that ASTB would be liable to Honeywell if ASTB failed to act with the knowledge and skill of the industry in providing expert services;

(l) failed to charge the jury on the points required to determine the *Ball v. Honeywell* case;

(m) failed to charge the jury regarding products liability as it pertains to a claim against the ladder manufacturer;

(n) failed to charge the jury on the issue of agency;

(o) charged the jury on the issue of punitive damages and thereupon submitting the issue of punitive damages to the jury, or alternatively failing to charge the jury with regard to Honeywell's burden of proof as to the punitive damages;

(p) failed to charge the jury properly and adequately on the determination of the amount of any punitive damages; and

(q) commented upon and/or recalled certain evidence during the charge.

ASTB's Motion for a New Trial as to the claims of Honeywell Against ASTB at 3-5.

At the conclusion of the presentation of evidence in this case plaintiff had established a prima facie case of: (1) intentional misconduct by ASTB in providing expert services in the *Ball* case; (2) gross negligence on the part of ASTB in providing expert services in the *Ball* case; and (3) negligence on the part of ASTB in providing expert services in the *Ball* case. This court in accordance with the applicable law instructed the jury: (1) as to the elements of each of these claims; (2) the burden of proof applicable to each of these claims; and (3) the damages recoverable on each of these claims. *Compare Pennsylvania Suggested Standard Jury Instructions,* §§ 3.01, 6.00, 13.17 *et seq.* with N.T. 7-19-62. Therefore, ASTB's allegations of error regarding the jury instructions are without merit.

Finally ASTB argues that "[t]his case involved numerous complex issues and the Court's refusal to submit ASTB's proposed interrogatories to the jury, . . . resulted in severe prejudicial harm to ASTB . . . ." ASTB's Brief in Support of its Motion for JNOV or Alternatively for a New Trial at 28. The interrogatories presented to the jury clearly, concisely and comprehensively presented the three claims of liability, the proximate cause of each claim, and the damages recoverable on each claim.

Defendant ASTB's motion for JNOV or new trial on Honeywell's claims is denied.

II. ASTB'S MOTION FOR JNOV AGAINST AETNA

ASTB filed a third-party complaint against Aetna alleging, *inter alia,* (1) that Aetna agreed to indemnify and hold ASTB harmless from any and all liability arising out of work performed in relation to the *Ball* case even if it were caused by negligence or gross negligence of ASTB, and (2) that Aetna caused harm to ASTB's business reputation due to its negligent defense of the *Ball* case. Third-party Complaint ¶¶12, 14. The only claim which went to the jury was the claim of whether or not Aetna agreed to hold ASTB harmless for negligence in the *Ball* case. N.T. 6-36, 6-40.

ASTB argues that "[t]he uncontroverted and credible evidence is that the indemnification clause contained in the 'Terms and Conditions' in ASTB's February 26, 1982 letter to Aetna is an enforceable part of the contract between Aetna and ASTB." Motion of ASTB for JNOV Against Aetna. This argument is without merit.

As noted above Mr. DeMaria testified that the contract in question was between ASTB and Honeywell and not between ASTB and Aetna. N.T. 2-12. This testimony provides a basis from which a reasonable jury could find that Aetna never agreed to hold ASTB harmless. ASTB also argues that "Aetna itself relied upon those Terms and Conditions when it asserted

that New York law applies to this controversy." Motion of ASTB for JNOV Against Aetna at ¶3. This argument is without merit. Simply because Aetna has argued that New York law applies to this contract does not mean that it (Aetna) admits to being a party to the contract. Furthermore, Aetna argued throughout this case that it was not a party to this contract. *See* Answer of Aetna to Complaint of ASTB at ¶4; Aetna's Response to ASTB's Motion for Summary Judgment at 2; and, Aetna's Arguments in Favor of Its Motion for a Directed Verdict Against ASTB at N.T. 6-22.

Finally, ASTB argues that "[t]he uncontroverted and credible evidence is that Aetna was negligent in its defense of Honeywell in *Ball v. Honeywell* . . . ." ASTB's Motion for JNOV Against Aetna at ¶4. This argument is without merit. Plaintiff's expert, Mr. Bechtle, testified that Honeywell's lawyer, Mr. DeMaria, had acted properly in his defense of the *Ball* case. N.T. 2-59. Furthermore, ASTB's expert clearly stated that he was *not* testifying to or implying that Mr. DeMaria acted negligently in defending the *Ball* case. N.T. 5-133. If there is any uncontroverted evidence in this case, it is that Aetna was *not* negligent in its defense of the *Ball* case.

III. ASTB'S MOTION FOR A NEW TRIAL AGAINST AETNA

ASTB argues that "[t]he Court erred in failing to submit to the jury ASTB's claim against Aetna for Aetna's negligence in the defense of Honeywell, Inc. in *Ball v. Honeywell* . . . . The Court erred in failing to instruct the jury on the issues relating to ASTB's claim against Aetna for Aetna's negligence in the defense of Honeywell, Inc. in *Ball v. Honeywell.*" Motion of ASTB for a New Trial as to its Claims Against Aetna at ¶2-3. The uncontroverted testimony of Mr. Perry Bechtle that Mr. DeMaria had acted properly in defending the *Ball* case compelled this court to direct a verdict on ASTB's claim of negligence against Aetna. *See* N.T. 2-59 and 5-133. In light of

this directed verdict it was proper not to instruct the jury as to ASTB's claim of negligence against Aetna.

ASTB next argues that

> the Court erred when it: (a) failed to give ASTB's requested jury instructions; (b) failed to instruct the jury properly and adequately regarding 'manifestation of assent'; (c) failed to instruct the jury that the indemnification clause was a part of the contract between Aetna and ASTB; (d) failed to instruct the jury that Aetna's signature to the indemnification clause was not required; and (e) failed to instruct the jury that several forms may make up a contract.'

ASTB's Motion for a New Trial Against Aetna at ¶4.

Before this case was presented to the jury for its decision I had: (1) ruled that the indemnification clause in question was invalid for any harm resulting from ASTB's intentional misconduct or gross negligence; *see* Order of February 27, 1987 at 6; and (2) directed a verdict against ASTB on its claim of negligence against Aetna. N.T. 6-36-40. The only issue which went to the jury was: whether ASTB proved that Aetna agreed to hold ASTB harmless for ASTB's negligence in the *Ball* case. The instructions which I gave to the jury, including the instructions made after counsel had made their objections, *See* N.T. 7-58, were standard instructions on the issue of contract formation and were in accord with the applicable law. *Compare* N.T. 7-43-45 and 7-58 *with, Litton Industries Credit v. Plaza Super of Malta, Inc.,* 503 F. Supp. 83, 86 (D.C.N.Y. 1980).

Finally, ASTB argues that "[t]he Court erred in failed to submit ASTB's proposed interrogatories to the jury ... the Court erred when it failed to inquire of the jury whether or not Aetna was negligent in the defense of *Ball v. Honeywell* ..." ASTB's Motion for a New Trial as to its Claims Against Aetna at ¶ 5. For the reasons discussed above it was proper for this

court to direct a verdict against ASTB on its claim of negligence against Aetna. Therefore, it was also proper not to submit a jury interrogatory on this issue. Furthermore, the interrogatory submitted to the jury concerning an alleged agreement between Aetna and ASTB clearly and concisely described ASTB's claim against Aetna.

An order follows.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

HONEYWELL, INC. — CIVIL ACTION

v.

AMERICAN STANDARDS TESTING BUREAU, INC.

v.

AETNA LIFE & CASUALTY CO. — No. 85-0158.

ORDER

AND NOW, this 7th day of December, 1987, for the reasons set forth in the foregoing Memorandum, it is ORDERED that:

1. The motion of defendant American Standards Testing Bureau, Inc. for judgment notwithstanding the verdict against plaintiff Honeywell, Inc., or in the alternative, for a new trial is DENIED.

2. The motion of defendant American Standards Testing Bureau, Inc. for judgment notwithstanding the verdict against third-party defendant Aetna Life & Casualty Co., or in the alternative, for a new trial is DENIED.

BY THE COURT:

/s/ JAMES MCGIRR KELLY, J.

James McGirr Kelly, J.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 88-1008

HONEYWELL, INC.

Appellee

vs.

AMERICAN STANDARDS TESTING BUREAU, INC.

Appellant

vs.

AETNA LIFE & CASUALTY COMPANY

Appellee

SUR PETITION FOR REHEARING

Present: GIBBONS, *Chief Judge*, SEITZ, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON, MANSMANN, HUTCHINSON, SCIRICA, and COWEN, *Circuit Judges*.

The petition for rehearing filed by appellant in the above entitled case having been submitted to the judges who participated in the decision of this court and to all other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular active service not having voted for rehearing by the court in banc, the petition for rehearing is denied.

BY THE COURT

Circuit Judge

July 25, 1988

SERVICE AGREEMENT

This Agreement is between American Standards Testing Bureau, Inc., 40 Water Street, New York, New York (hereinafter referred to as "ASTB") and the addressee named on the face hereof or in the document attached hereto, as principal, (hereinafter referred to as "Purchaser") and constitutes the complete and exclusive terms and conditions between the parties.

I

ASTB agrees, on behalf of Purchaser, to perform the tests or services described on the face or in the attached document ("Project") in accordance with standard professional engineering practices and procedures. Purchaser agrees and shall pay ASTB for the services in accordance with the terms described on the face of this instrument or in this attached document. Terms are net cash and payable on presentation of invoice. There is a minimum charge of Two Hundred ($200.00) dollars for each Project undertaken for Purchaser by ASTB. All rates are subject to annual review and/or change by ASTB. Purchaser must cancel this agreement pursuant to Section III if Purchaser does not accept new rates after written notice thereof.

II

It is mutually agreed that time is of the essence herein and ASTB agrees to strive to complete the services within a reasonable time. ASTB shall not be responsible or liable for, nor be deemed to be in default on account of any delay or failure to perform services if due to any cause or condition beyond ASTB's reasonable control.

III

ASTB and Purchaser both agree that either party may terminate this Agreement upon 10 days written notice, registered mail, to the other party and that ASTB is entitled to full payment for all costs, fees and expenses incurred and services rendered as of the effective date of the termination.

IV

It is agreed by the parties hereto that confidentiality shall be respected and ASTB agrees to use its best efforts to maintain such on information supplied by Purchaser as well as results of tests on samples submitted hereunder and will not disclose such information to others save and except under penalty of any subpoena power of any court of competent jurisdiction or with the permission of Purchaser. Purchaser agrees to compensate ASTB at the rates printed on the front of this contract for all time expended on and/or in connection with depositions, EBT's, court appearances, and discovery of any kind resulting from participation in this Project including those brought about by subpoenas, notices or court orders issued by or granted to an adverse or third party (or parties).

V

ASTB agrees to use its best efforts to perform the services above described. However, because of the nature of such services, ASTB makes no warranty or guarantee whatsoever in connection with the terminating of the services or the use of implementation of such services by Purchaser.

VI

ASTB shall only be responsible for the loss, destruction or damage to any property furnished by Purchaser which shall directly result from or be caused by the gross negligence or willful misconduct of ASTB or its agents, representatives or employees and any liability or obligation of ASTB shall not exceed one hundred dollars ($100.00) or the fair market value of such property whichever is less.

VII

Purchaser agrees to refrain, without ASTB's written permission, from associating ASTB's name with any product or service that may utilize in any way the results, either expressly or implicitly, of the work performed by ASTB under this agreement. Reports resulting from this agreement become Purchaser's property, however, ASTB's authorization in writing is required if reports provided hereunder are reproduced in whole or in part for use outside Purchaser's organization.

VIII

PURCHASER AGREES TO INDEMNIFY AND HOLD ASTB HARMLESS FROM ANY AND ALL LIABILITY, CLAIMS DEMANDS, SUITS, DAMAGES OR COSTS OF ANY KIND AND NATURE, INCLUDING ANY AND ALL EXPENSES, LEGAL OR OTHERWISE, INCLUDING THOSE ON ACCOUNT OF INJURY OR DEATH OF PERSONS OR DAMAGE TO PROPERTY, INCLUDING LOSS OF EARNINGS OR PROFITS, FOR OR ARISING OUT OF THE TESTS, SERVICES, REPORTS, TESTIMONY, AND/OR WORK PERFORMED IN RELATION TO THE PROJECT EVEN IF IT BE CAUSED BY THE NEGLIGENCE OR GROSS NEGLIGENCE OF ASTB, ITS AGENTS, OFFICERS, EMPLOYEES, OR OTHERWISE.

IX

Neither this agreement nor any rights or obligations under this Agreement shall be assigned or otherwise transferred by Purchaser without the prior written consent of ASTB. The relationship of ASTB to Purchaser under this Agreement is that of an independent contractor and nothing herein shall be construed as creating any other relationship. This agreement shall be governed by the laws of the State of New York.

ASTB/PHILADEPHIA 1075 DeHaven Street, W.
Conshohocken, PA 19428 (215) 825-2010

February 26, 1982

Aetna Life & Casualty
1617 Kennedy Blvd.
Philadelphia, PA 19103

Att: Joseph C. DeMaria, Esq.

Gentlemen:

RE: Ball -vs- Honeywell, Inc.
Your File #78-194
ASTB P. #2400/PH

This is to acknowledge your request and to advise of our entering captioned assignment as ASTB Project #2400/PH. All future communications should include our project designation for proper reference.

ASTB's services are extended to your firm on the basis of the conditions printed overleaf. As soon as we receive or collect all background information and our staff complete their study, you will receive our report of findings.

We are looking forward to being of service.

Sincerely yours,

AMERICAN STANDARDS TESTING BUREAU, IN

DENNIS J. MELOY
Professional Services

DJM/jm

Casualty & Surety Division
1617 John F. Kennedy Boulevard
Philadelphia, PA 19103
854-7200
854-7305 Bill Bennett

July 20, 1978

HoneyWell, Inc.
1100 Virginia Drive
Fort Washington, Pennsylvania 19034

John Ball VS Honeywell Inc. Class Letters CGL

We have received *Complaint in Trespass* filed against you in the above case.

This matter has been referred to our attorney(s), *Joseph DeMaria Suite 946 Suburban Station Building, Phila, Pa 19103.* Our attorney(s) will take all steps required in your behalf in accordance with the terms and conditions of the policy of insurance applicable to this case.

The amount sued for is *in excess of $10,000* for injuries allegedly sustained by the above claimant(s). While we believe that the amount of protection under your policy is adequate, we must call to your attention the fact that it is possible for a judgment to be obtained in excess of your policy limits. For that reason, you are at liberty, if you so desire, to associate your own personal counsel, at your own expense, in the defense of this suit.

Thank you for your cooperation in referring this matter to us promptly.

Very truly yours,

JOHN MILBURN

Law Offices
JOSEPH C. DEMARIA
Suite 1745
1617 John F. Kennedy Blvd.
Philadelphia, Pennsylvania 19103

(215) 563-2831

Daniel G. Leeds
Michael B. Egan

March 8, 1982

AMERICAN STANDARDS TESTING BUREAU, INC.
1075 DeHaven Street
West Conshohocken, PA 19428

ATTENTION: Nadine Malherb

RE: BALL VS. HONEYWELL, INC.
Our File: 78-194
Your File: 2400/PH

Dear Miss Malherb:

This will confirm our recent phone conversation wherein I gave you some brief details concerning our request relative to the above assignment. Once again, this is a lawsuit by an employee of the Bell of Pennsylvania who was injured at the facility of our client, Honeywell, Inc., in Fort Washington while he was attempting to string a phone line through a suspended ceiling. At the time, he was standing on top of a step ladder and lost his balance falling from it, and in the process, entangling his leg in the steps of the ladder. The ladder then fell over and struck a glass panel at the top of a metal office partition which enclosed the area in which he was working. He was actually working in a small research laboratory which was confined by moveable metal office partitions which are 67 and ¼ inches in height with a pane of 3/16 of an inch thick regular

fluted frosted glass panels 28 inches in height along the top of the partitions. These metal panels were capped with a metal strip. Normally, only two persons would work in the area in question which had dimensions of 12 feet by 5 feet 6 inches. Attached are copies of sketch of the partition in question and the research area itself, along with two witness statements concerning the occurrence. As a result of the step ladder striking the glass, the glass shattered and the Claimant, who was off balance and apparently flailing his arms about, cut his left hand on a shard of broken glass. The Plaintiff has brought a lawsuit against our client on the basis that the presence of the regular glass in the partition created ān unreasonable risk of harm, and has further made some erroneous allegations that the use of the glass in this instance was in violation of a certain state law which requires use of safety glass in certain designated applications.

J. C. DeMaria — Direct

Q. What did you do by way of getting American Standards Testing Bureau involved in the case?

A. Well, I went through my folder that I maintained on various providers of services and I retrieved the folder, the pamphlet that ASTB had left with me and I proceeded to call the phone number on there for the purpose of retaining their services.

Q. Let me show you what has been marked as Plaintiff's Exhibit 2 and ask you to identify that, please? (Handing)

A. This is a copy of a letter which I wrote under date of March — dictated under date of March 8, 1982 to ASTB for the purpose of retaining their service.

MR. ALLEN: Your Honor, I move Plaintiff's Exhibit 2 into evidence.

THE COURT: Any objection, gentlemen?

MR. D'ANGELO: No objection, your Honor.

MR. GOLDFEIN: No objection.

THE COURT: Very well.

(So marked in evidence)

Q. Mr. DeMaria, would you please quickly summerize the substance of the letter and then please read to the jury the second and third sentences on Page 2 of the letter?

A. Well, basically, I confirmed in the letter a conversation which I had with a Ms. Nadine Malherbe, who was the person who spoke with me on the phone when I initially called them to make the retainer.

actual violation of any kind of ordinance or statute.

Q. Let's see, the trial started on Monday, January 10 and when is it that you first met doctor Charles Peck?

A. Well, that would be the following Wednesday. The 10 was a Monday and after the adjourn meant of Court on that Wednesday, which I believe it was somewhere between 4 and 4:30, I returned to my office and Dr. Peck was awaiting me at that point in time.

Q. You are referring to Wednesday, January 12th, two days after the trial started?

A. I believe that's correct. I believe that's the correct date.

Q. Now, just to clear up one thing that was said earlier, was there any rule of civil procedure that you violated by not identifying Dr. Peck to the other side, to Mr. Ball's lawyers earlier than you did?

A. No.

Q. Had they ever served what is known as, "Expert interrogatories" On you?

A. No.

Q. Was it after the trial started or before the trial started that the ruling was made by Judge Kremer that Dr. Peck had to be deposed before he could testify?

A. Prior the the commencement of trial.

Q. Now, you met with Dr. Peck late Wednesday and, again, without any detail, please give the thrust of that meeting and

involved with or had heard of the case of Ball versus Honeywell.

Q. Would you look at page 8, please?

A. Which page?

Q. Page 8?

A. 8?

Q. I am sorry. Page 80. Line 14.

Again, we are looking at a transcript in the same sense of the transcript we were looking at earlier, a verbatim recount of the exact testimony; is that correct, sir?

A. Yes.

Q. Would you please read Dr. Peck's testimony at lines 14 and 15 on page 80?

A. "Well, I didn't get involved in this until a few days ago."

Q. Before Dr. Peck said that, did you, Mr. DeMaria, have any knowledge that Dr. Peck had not been involved in this case until a few days ago?

A. Of course not.

MR. ALLEN: With the Court's permission, again, to save Mr. DeMaria's vocal chords, if I may be permitted to read several fairly short excerpts of the situation of Dr. Peck into the record?

THE COURT: Yes.

MR. ALLEN: Reading first from page 82 at line 10 and these are questions by Mr. Ball's lawyer:

"Q: Let me try to get this straight in my mind because maybe I am missing something —"

MR. D'ANGELO: Your Honor, we ought to be clear for the record and I object to reading from this transcript of Dr. Peck's testimony.

To the extent that it is simply that this is what Mr. DeMaria heard at that time, it's fine, but to the extent that it is a statement of what actually happened, in effect to Dr. Peck's testimony now, we object to it as hearsay.

THE COURT: Dr. Peck was an employee serving as an agent of ASTB; was he not, at the time this was given?

MR. D'ANGELO: At the time this situation was given, he was an ASTB expert.

THE COURT: I will allow it.

MR. ALLEN: Again, these are questions by Mr. Ball's lawyer:

"Q: Let me try to get this straight in my mind because maybe I am missing something.

"Mr. DeMaria: I am missing something, too.

"Q: Let me get this straight, I am losing something in the translation here. You never knew about John Ball being hurt at Honeywell because of some incident involving a ladder and a piece of glass until Monday; is that correct?

"A: That is correct.

"Q: You had never done any preliminary investigation or anything like that?

"A: That is correct."

Q. Mr. DeMaria, did the name of "Moffit" come up in the situation of Dr. Peck and if so, would you please give a summary of what was said about Mr. Moffit?

A. Yes, he did mention a Mr. Moffit.

Q. What was the — what is a summary of what he said about Mr. Moffit's involvement in this?

A. Well, he went on to indicate that this matter actually was assigned to an individual named Moffit —

Q. You mean assigned by ASTB?

A. That's correct.

Q. All right.

A. That this individual is the one who actually investigated the matter, went to the Honeywell facility and looked around and who more or less did the initial investigation. He indicated that not long after that was completed, this Mr. Moffit suffered a stroke and was unable from that point on to become involved in the matter.

Q. In this situation on January 12, 1983, did Mr. Peck indicate whether or not at any time before two days ago he had ever seen Plaintiff's Exhibit 5?

A. No, he indicated that he had not.

Q. And, would it be fair to say, sir, that Dr. Peck testified on that day that he had had no knowledge or involvement whatsoever in the Ball versus Honeywell case until Monday, two days before his situation on January 12, 1983; is that correct?

A. That is precisely what he indicated.

Q. Mr. DeMaria, would you please tell the jury what, if any decision you made after hearing this testimony by Dr. Peck?

A. Well, the immediate thing that had to be done was to stop the deposition at that point in time, because it was clear that Dr. Peck and/or Dr. Morfopoulos had misled me as to their involvement, the nature and extent of it in the matter. I had never dreamed of asking a question like that of Dr. Peck, when did you first get involved in this, because the report that had been given to me, plus the conversation with Dr. Morfopoulos had ostensibly indicated that answer to me.

At that point in time, I adjourned to another room with Mr. Greitzer and Mr. Balefsky and it was quite apparent from the expressions on their faces, that they were very chagrined at what Dr. Peck had said. It became also apparent to me at that point in time that I had to a assure them immediately that in no

way was I aware that such a thing had been done. That this report had been submitted with that date on it, under the purported certification of Drs. Peck and Morfopoulos, without Dr. Peck actually having participated in the matter on that chronological basis.

They more or less indicated to me that they did not feel that I was a conspirator in this or had perpetrated a part in this. At that point, I further had to make a decision whether to continue with this deposition, not knowing what Dr. Peck was going to say. So, I more or less made a command decision, I guess would be the way to describe it at that point, that the deposition would have to be stopped and that I probably was not going to be able to risk putting Dr. Peck on the stand under circumstances that raised grave question as to his veracity or integrity in terms of participation in the matter.

At that point, the deposition was adjourned. We started to walk back from Mr. Greitzer's office to my office —

Q. When you say, "we", who are you referring to?

A. Dr. Peck and myself.

Q. Go ahead.

A. And, Dr. Peck indicated to me, "Well, Joe —"

MR. D'ANGELO: Objection, your Honor. Hearsay.

THE COURT: It's hearsay of an agent of the defendant.

MR. D'ANGELO: Your Honor, the statement that is being offered at this point, I believe is not going to be a statement of ASTB, but rather personally of Dr. Peck. Dr. Peck, as I understand it, will be a witness here in this trial.

THE COURT: I understand, but there is not a person called "ASTB." That's artificial. They can only operate through their employees or agents. I'll allow it.

Ladies and gentlemen, this witness is going to recount for you all that he remembers that Dr. Peck said. I understand that Dr. Peck will be a witness, but to agree or disagree with the

J. C. DeMaria — Direct (Continued)

"Q: Do you know who that is?

"A: I do not.

"Q: Did you authorize this person to sign your name to this?

"A" That's —

"Q: Do you not even know who it is who signed it; is that correct?

"A: That is correct.

"Q: So therefore, you would not even know whether you authorized anybody to sign this signature?

"A: That's right."

Q. Thank you. Now, Mr. DeMaria, after the conclusion of the deposition and your decision that you would not attempt to call Dr. Peck as a witness in the case, was there any further discussion of settlement before Judge Kremer, the judge in the Ball versus Honeywell case?

A. Yes, there was.

Q. And, what was that?

A. Well, that took place around the time when we had that discussion in chambers. I believe we already read a portion of that discussion into the record. And, at that point in time, Judge Kremer recommended that the matter be settled for the total amount of $175,000.

Q. It was not settled; was it?

A. No, it was not.

Q. What is the part that is not?

A. Well, I didn't say that part was not. I simply indicated it was not the entire answer. Additionally, now that we had an expert, since the plaintiff injected an expert into the case, we not only had the defense of the negligence of the plaintiff, but now, we had an authoritative source, also, who would be able to indicate that there was nothing improper by Honeywell.

Q. In 1981, you had an authoritative source saying there was nothing improper by Honeywell?

A. I am sorry, we did not retain them until I believe that was the early part of 1982. You are correct. So, at that point in time, it would have been soley the contributory negligence.

Q. And the case was called to trial on a few occasions during 1981; isn't that correct?

A. It was placed on the trial list. I don't recall if we were actually ever assigned a specific judge, but six or seven —

Q. But it was in the top 25, where you are supposed to be ready to go on 24 hours notice?

A. Yes, that's correct.

Q. Now, at the time the decision was made to reject the $175,000 recommendation Judge Kremer had placed upon this after you had presented your version of what had happened and what was involved in the ASTB report — before that had happened, you had already decided there was going to be litigation against American Standards Testing Bureau; didn't you?

bearing Dr. Peck's signature, which you later learned he knew nothing about; isn't that right?

A. That is correct.

MR. GOLDFEIN: Thank you, Mr. DeMaria.

MR. ALLEN: Just a question or two.

REDIRECT EXAMINATION

BY MR. ALLEN:

Q. In 1981, when the case was in the top 25, that's when you were notified about Dr. Brenner, as I recall your testimony yesterday; is that correct?

A. That's correct.

Q. If the case had gone to trial in 1981, did you have a motion on record to exclude the testimony of Dr. Brenner?

A. Well, as I testified yesterday, I immediately contacted Mr. Balefsky and prepared — told him I was preparing a motion, a court document to hand up to the calendar judge to request the court to preclude the testimony of Dr. Brenner.

Q. And, in 1981, did you have an opinion from a legal standpoint as to whether if the case were called at that time there would be expert testimony of any kind presented in the case?

A. At that moment, in my opinion, because of the late juncture, I believed the court would grant the motion and disallow the expert testimony.

Q. There were questions, sir, about the $175,000 settlement

J. C. DeMaria — Direct (As on Cross)

A. The two gentlemen who came into the building told me that and on the flyer, one of the representative clients of ASTB was Aetna Casualty and Surety.

Q. Isn't it true Aetna has used ASTB since this whole situation arose in January, 1983?

A. I can't say of my own personal knowledge that Aetna has used them since, but eventually, I learned that Aetna had infact retained their services in a number of matters. Infact, matters that were pending at the time that we are discussing.

Q. And, there are still more matters pending.

A. I don't know that of my own personal knowledge.

Q. Have you heard what ASTB is willing to testify from Dr. Morfopoulos and you then at that point directed them to write a report; is that correct?

A. That's my recollection of it, yes.

Q. Then, you got the report which has been enlarged there dated March 25, 1982; is that correct?

A. Yes.

Q. And, you were satisfied with the report, you felt that it was perfect for your purposes; right?

A. Yes.

Q. And you saw the names, "C. F. Peck" and "V. Morfopoulos";

Charge of the Court

Now, if the contract between the parties in this case was sent over and signed, the other person signed it, the problem won't be that difficult, but in this case, it's up to you to decide, considering all of the circumstances, when that printed form was sent over to Mr. DeMaria in the manner it was sent and in the condition it was sent and everything else, it is reasonable for a third-party looking over the actions between the parties, as you now know all the actions, all the letters going back and forth and whether there was a discussion, I don't recall new discussions about signing the contract or in the signing the contract or are you in accord with that agreement or are you not in accord with that agreement, that's up to you, it's up to you to look at all the circumstances surrounding the paper, and determine is it reasonable for you to say that that paper, printed form, was the contract of the engagement between Aetna and ASTB? If you find there was, then there was a contract to hold harmless. In other words, there's a contract to hold harmless. If you find that there was not, then there was not a contract to hold harmless.

In other words, you can have a contract. Most contracts or many contracts are not hold harmless. ASTB can only recover against Aetna in this case if you decide that that written contract, that form was the agreement between the parties and they manifested an ascent to that form.

Verdict

THE FOREPERSON: $306,000.

THE CLERK: Question 6: "State the amount of punitive damages, if any, to be awarded against Defendant ASTB?"

THE FOREPERSON: $13,900.

THE CLERK: Question 7: Did Defendant ASTB prove by a preponderance of the evidence that Third-Party Defendant Aetna contracted to hold Defendant ASTB harmless for negligence for the rendering of its services in the case of Ball versus Honeywell?"

THE FOREPERSON: No.

THE CLERK: Members of the Jury, please rise. Harken onto your verdict as the Court has recorded it in the issue wherein Honeywell, Inc. is the plaintiff, American Standards Testing Bureau, Inc. is the defendant and Aetna Life and Casualty Company is the Third-Party Defendant, you have answered the interrogatories as follows:

Question 1 is: "No."

Question 2 is: "Yes."

Question 4 is: "Yes."

Question 5 is: "$306,000."

Question 6 is: "$13,900."

Question 7 is: "No."

And, so say you all?

THE JURY: Yes..

THE COURT: Thank you, you may be seated. I am going to ask the Clerk to ask the Foreman of the Jury for a copy of verdict form.

as exploration of the deeper portion of the cavity for removal of any elements of the cyst although the surgical process appeared to be of a minor nature requiring a half an hour and performed under nerve block anesthesia. Dr. Weber stated that although in his last deposition he stated the clt had approximately 85% range of flexation in the left long finger. Since that time the clt had actually sustained a considerable decrease in both active and passive range of motion. He added that the clt now has lost the function of the particular finger almost completely to the extent that in the opinion of the doctor is totally worthless function.

In an effort to counter the expert outlined in our last report we had enlisted the services of American Standard Testing Bureau report of 3/25/82 is attached and self-explanatory. Report signed by C. F. Peck clearly indicates that in his opinion no responsibility on the part of our Insd. He states that the glass meets the usual standards. In fact is stronger than double strength glass panes and other wise common to all such partition products installed in office buildings, laboratories, hospitals, schools, and variety of other buildings around the country.

As a side light in my discussion with defense counsel we note in the report Peck seems to question plaintiff's expert's qualifications. Suggest that plaintiff only has technical critique based on applicable standards in the automotive industry which is not relevant to requirements, human habitats, etc.

As to my inquiry to defense counsel, my personal concern of Insd's vulnerability, interpretation of the partition involved whether it's movable can be used to areas of traffic. I have been assured by defense counsel that no safety glass would be required in this type of partition. He states in fact in his opinion an expert should not be necessary although we now have one.

THINGS TO DO: 1. Follow for ongoing already additional discovery; trial date.

EVALUATION: FLV = $75,000. We have increased the value based on special damages known as follows: wage loss = 5/4/77 to 9/6/77 and 6/26/78 to 9/25/78 was $9561. Earnings lost 2/26/79 to 5/18/79 = $4401.40.

Medical the Petition for listing as a major case = $7374.35 and we believe this does not include two more recent surgical processes including any disability involved therewith. The injury itself appears to be the same previously evaluated, however, we are now involved with six surgical processes and some substantial loss of use of the left long finger and the left non-dominant hand.

Reserve = $7500 based on the prior Committee Review as a case defend. Nothing is changed as far as the liability picture so we maintain the 90% COSD.

CIVIL COURT OF THE CITY OF NEW YORK
COUNTY OF NEW YORK
INDEX NO. 68403/85

AMERICAN STANDARDS TESTING BUREAU, INC.,

Plaintiff,

against

FRANCIS J. LYNCH, J.D., P.C.,

Defendant.

SCHOENFELD, J.

In this breach of contract action defendant moves to dismiss pursuant to CPLR 3211(a)(8) alleging that this court lacks jurisdiction over him. Plaintiff opposes the motion.

Defendant, a Massachusetts attorney, telephoned plaintiff's New York office in order to obtain certain engineering services. By letter dated August 1, 1983 plaintiff advised defendant of its acceptance of the assignment. The letter contains specific conditions including that the agreement be governed by New York law and that, in the event of legal proceedings, defendant agrees to submit to the jurisdiction of the New York courts. Defendant now contends that he never agreed to such terms and is not bound by them. However, defendant never informed plaintiff that he would not accept these conditions, and did in fact use the plaintiff's services. Under such circumstances defendant's silence constitutes an acceptance of the terms. *Josephine and Anthony Corp. v. Horwitz* 58 A.D.2d 643; *Costello v. Standard Metals* 99 A.D.2d 227, 231.

Having determined that the conditions set forth in the August 1 letter are part of the contract, the next issue is whether such terms are valid. Generally a contractual selection of governing law of a particular state is valid so long as there is a reasonable basis for selecting that state. *Freedman v. Chemical Construction Corp.*, 43 N.Y.2d 260, 265; *Zerman v. Ball*, 735 F.2d 15, 19-20; *Mon-Shore Management, Inc. v. Family Media, Inc.* 584 F.S. 186, 193. Here, plaintiff is situated in New York, defendant telephoned plaintiff's New York office to obtain its services, the letter agreement was mailed from, and the engineering report prepared in New York. There are clearly sufficient New York contracts, and defendant should be found to have submitted to this State's jurisdiction. See *National Equipment Rental, Ltd. v. Dec-Wood Corp.*, 51 M.2d 999.

The motion to dismiss is denied.

/s/

J.C.C.

Dated: April 28, 1986.